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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1995

AMPHITHEATER PUBLIC SCHOOLS, et al.,

Petitioners,

v.

FAITH AITKEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

PETITION FOR WRIT OR CERTIORARI

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86 pp

QUESTIONS PRESENTED

1. Where Arizona Revised Statute ("A.R.S.") § 23-1023(C) gives an employer or its worker's compensation insurance carrier a lien, for compensation paid, against proceeds actually collectable by the injured worker in a separate action against a third-party tortfeasor, and

Where A.R.S. § 12-2506(A-B), which allows recovery of damages from any defendant only proportionately to that defendant's percentage of fault, and where the fault of all parties and non-parties, including that of non-party employers who cannot be parties, is considered in reaching the percentage,

Does the Arizona Supreme Court's construction of these statutes, which is that together they require the lien under § 23-1023(C) to be reduced by the amount that the percentage of fault assessed against the non-party employer in the third party action reduces the worker's recovery from the third party under § 12-2506, create a taking without due process in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States?

2. Does this Court have jurisdiction to review and decide question number 1, where the claim that the Arizona Supreme Court's construction of A.R.S. § 23-1023(C) and § 12-2506 together creates a taking without due process in violation of the Fifth and Fourteenth Amendments of the federal Constitution was expressly raised for the first time in a motion for reconsideration to the Arizona Supreme Court after its opinion was issued?

LIST OF PARTIES

The parties to the proceedings below were Faith Aitken, the Industrial Commission of Arizona, Amphitheater Public Schools, and Unigard Insurance Company. There are no parents or subsidiaries.

Also, 28 U.S.C. § 2403(b) (printed in Petitioners' Appendix hereto, at A-42) may apply because the constitutionality of the construction of two Arizona statutes is drawn into question and therefore, three copies of this document are served on the Attorney General of Arizona.

The following entities filed amicus briefs in the Supreme Court of Arizona: Arizona Trial Lawyers Association, Southern Arizona Worker's Compensation Claimant's Attorney's Association, and Employers Insurance of Wausau.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLES OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	4
1. Background facts of Arizona's worker's compensation lien, and the non-party at fault statute	4
2. Specific facts and procedural history in this case	6
ARGUMENTS WHY THIS PETITION SHOULD BE GRANTED	10
I. The Arizona Supreme Court's decision in this case creates a taking of property without due process by reducing the employer/carrier's lien by a finding of nonparty fault,	

Page

where the employer is not entitled to defend itself, and this affects every worker's compensation case in Arizona involving a third-party tortfeasor. 10

II. This Court's jurisdiction to grant this petition and review the Arizona Supreme Court's decision has been adequately preserved by the raising of the takings in violation of due process of the Fifth and Fourteenth Amendments in the motion for reconsideration to the Arizona Supreme Court. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases	Page
Aitken v. Industrial Commission, 183 Ariz. 387, 904 P2d 456 (Ariz. 1995)	1, 2, 8, 10, 11, 12, 13, 19, 20
Aitken v. Industrial Commission, 173 Ariz. 300, 842 P.2d 1313 (Ariz.App. 1992), *vacated*, 183 Ariz. 387, 904 P.2d 456 (Ariz. 1995).	2
Anderson v. Industrial Commission, 147 Ariz. 456, 711 P.2d 595 (Ariz. 1985)	4
Armstrong vs. United States, 364 U.S. 40, 80 S.Ct. 1563, 41 L.Ed.2d 1554 (1961)	14, 15
Bankers Life & Casualty Company vs. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988).	17, 18
Barrio vs. San Manuel Division Hospital, 143 Ariz. 101, 692 P.2d 280 (Ariz. 1984)	19
Dietz v. General Electric Co., 169 Ariz. 504, 821 P.2d 166 (Ariz. 1991)	11

	Page
Dombey vs. Phoenix Newspapers, 150 Ariz. 476, 724 P.2d 562 (Ariz. 1986).	19
Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)	20
Hathorn vs. Lovorn, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982)	18
Hawkins vs. Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073 (1987)	19
In re Riverton State Bank, 49 P.2d 637 (Wyo. 1935)	19
Johnson vs. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)	18
Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1962)	14
Love vs. Bracamonte, 29 Ariz. 537, 241 P. 514 (Ariz. 1925)	19
Lowing vs. Allstate Ins. Co., 176 Ariz. 101, 859 P.2d 724 (Ariz. 1993)	14
Mannel vs. Industrial Commission, 142 Ariz. 153, 688 P.2d 1045 (Ariz.App. 1984)	13

	Page
Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3468, 77 L.Ed.2d 1201 (1983)	20
Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)	14
Neil v. Kavena, 176 Ariz. 93, 859 P.2d 203 (Ariz.App. 1993)	11
Penrod vs. Financial Institutions Liquidation Corp., 50 F.3d 459 (7th Cir. 1995)	13
Polito vs. Industrial Commission, 171 Ariz. 46, 828 P.2d 182 (Ariz.App. 1992)	13
Rubens vs. Costello, 75 Ariz. 5, 251 P.2d 306 (Ariz. 1952)	19
Ruth v. Industrial Commission, 107 Ariz. 572, 490 P.2d 828 (Ariz. 1971)	11
Sniadach v. Family Finance Corp. of Bay View,395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969)	12
State Compensation Fund vs. Nelson, 153 Ariz. 450, 737 P.2d 1088 (Ariz. 1987)	13
Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 542 P.2d 1102 (Ariz. 1975)	11, 12

Page

United States vs. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) 12,14

Constitutional Amendments

Fifth Amendment to the United Stated Constitution i, 3, 10, 12, 13, 15, 16, 17, 20

Fourteenth Amendment to the United States Constitution i, 3, 10, 13, 16, 17, 20

Arizona Constitutional Provisions

Article 2, § 31 7

Article 18, § 6 7

Statutes

28 U.S.C. § 1257(a) 3

28 U.S.C. § 2403(b) ii, 3

Arizona Revised Statute Annotated ("A.R.S"):

A.R.S. § 12-2506 11, 15

A.R.S. § 12-2506(A) i, 3, 5, 11

A.R.S. § 12-2506(B) i, 3, 5, 6 ,8

A.R.S. § 23-901 et. seq. 4

	Page
A.R.S. § 23-906	4
A.R.S. § 23-1022(A)	4
A.R.S. § 23-1023(B)	4
A.R.S. § 23-1023(C)	i, 3, 7, 8, 10, 11, 13

Arizona Rules of Civil Appellate Procedure

Arizona Rules Civil Appellate Procedure Rule 22	3, 17, 18

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PETITION FOR WRIT OF CERTIORARI

Petitioners AMPHITHEATER PUBLIC SCHOOLS and UNIGARD INSURANCE COMPANY respectfully pray that a Writ of Certiorari issue to review the award and opinion of the Supreme Court of Arizona entered in the above-entitled proceeding.

OPINIONS BELOW

The Supreme Court of Arizona issued and filed its Opinion in *Aitken v. Industrial Commission* on October 17, 1995, and which is reported at 183 Ariz. 387, 904

P.2d 456 (Ariz. 1995) and reprinted in the Appendix hereto at pages A-1 through A-16, infra. Thereafter, the Supreme Court of Arizona denied the petitioner's motion for reconsideration on December 19, 1995, with said order being reprinted in the Appendix hereto at page A-36. A mandate was issued January 18, 1996, and is reproduced in the Appendix hereto at A-38.

The Opinion of the Court of Appeals of Arizona was filed May 14, 1992, and is reported at 173 Ariz. 300, 842 P.2d 1313, vacated at 183 Ariz. 387, 904 P.2d 456 (Ariz. 1995), and is reprinted in its entirety in the Appendix hereto at A-17 through A-25.

The administrative law judge in the Industrial Commission of Arizona issued his findings and award on May 8, 1991 (A-28 through A-35), and on August 6, 1991, entered his award affirming the findings and award. (A-26 through A-27). These findings and awards of the administrative law judge are unreported.

JURISDICTION

The original opinion of the Supreme Court of Arizona was filed October 17, 1995. A motion for reconsideration was timely filed with the Supreme Court of Arizona on October 31, 1995, and a supplement to motion for reconsideration was filed November 13, 1995, and was denied by order of the court on December 19, 1995 (See Appendix, page A-36), with the order of denial being entered December 21, 1995. A mandate was issued January 18, 1996 (See Appendix, page A-38). This Petition for Writ of Certiorari is filed on March 15, 1996, within ninety (90) days of December 19, 1995

This Court has jurisdiction to review the judgment and opinion of the Supreme Court of Arizona under 28 U.S.C. 1257(a), because the Supreme Court of Arizona has construed two Arizona statutes, Arizona Revised Statutes (hereinafter, "A.R.S.") § 12-2506(A) and (B) and § 23-1023(C) together in such a way that creates a taking of lien rights without due process, which is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States. 28 U.S.C. § 2403(b) applies, and the Arizona Attorney General has been notified pursuant to Supreme Court Rule 29.(4)(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes and rules involved, which are set out verbatim at A-40 through A-52, infra, are: Fifth and Fourteenth Amendments to the United States Constitution; A.R.S. § 12-2506(A) and (B) and § 23-1023(C), and Rule 22 of the Arizona Rules of Civil Appellate Procedure.[1]

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[1]/ Two versions of A.R.S. § 12-2506 are printed in the Appendix at A-43 and A-45, because the statute was amended between the time of the awards and opinion of the Industrial Commission of Arizona and the Arizona Court of Appeals, and the opinion of the Supreme Court of Arizona. The amendments however, are not relevant to the issues in this petition.

STATEMENT OF THE CASE

1. Background facts of Arizona's worker's compensation lien, and the non-party at fault statute

Under Arizona's statutory worker's compensation scheme,[2] persons who elect to receive worker's compensation give up the right to directly sue their employer except in certain situations which are not relevant to this case.[3] Meanwhile, the worker is entitled to bring a case against third parties who contributed to their injuries. A.R.S. § 23-1023(B). An employer or its worker's compensation carrier has a lien against the amount actually collectable from the third-party tortfeasor in the third-party lawsuit. This lien is expressly set forth in A.R.S. § 23-1023(C) which states in pertinent part:

> "If [the worker] proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such

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[2]/ Ariz.Rev. Stat. § 23-901 et seq.

[3]/ *See Anderson v. Industrial Commission*, 147 Ariz. 456, 457, 711 P.2d 595, 596 (Ariz. 1985); A.R.S. §§ 23-906(A) 23-1022(A) (these statutes are not involved in the issues raised in this petition).

> compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expense, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. * * * "

In the third-party lawsuit that the worker brings against the third-party tortfeasor, that third-party defendant may obtain a finding of comparative fault based on a finding of fault of all persons who contributed to the loss. A.R.S. § 12-2506(A) and (B). This includes a finding of fault against non-party employers who, by virtue of the worker's compensation scheme, cannot be named as parties in the third-party action. The finding of fault against a non-party is not to be used for purposes of liability against any such non-party in any proceeding:

> "Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action."

A.R.S. § 12-2506(B).

These statutes come into play when the worker sues the third-party tortfeasor in a separate civil tort action. The defendant tortfeasor in that action names as many other persons to be at fault as he can in order to decrease his share of the overall damages. This includes naming the employer as a non-party at fault. No notice of this is required to be given to the non-party employer, nor is the employer or its worker's compensation carrier entitled to appear in the third-party action to defend against the finding of its fault, even it receives courtesy notice.

2. Specific facts and procedural history in this case.

Respondent Faith Aitken, while in the scope of her employment as a custodian with Amphitheater School District in Tucson, Arizona, was injured when she stepped out of a doorway and fell where a sidewalk had been removed by Maya Construction Company. She filed a worker's compensation claim and received $28,929.70 in benefits from Amphitheater's worker's compensation carrier, Petitioner Unigard Insurance Company. She also filed a separate civil third-party lawsuit against Maya. In that third-party civil suit, Maya alleged that Aitken was contributorily (meaning, comparatively) negligent and also named Amphitheater as a non-party at fault, as it is permitted to do under A.R.S. § 12-2506(B).

A jury in the third-party action assessed total damages of $319,292.00 and apportioned responsibility as follows: 65% to Maya, 25% to Amphitheater, and 10%

to Aitken. As a result, the judgment against Maya was only for 65% of the total amount, and the court entered judgment against Maya in the amount of $207,350.00.[4] From the awarded sum of $207,350.00, Aitken reimbursed Unigard $28,929.70 for benefits previously collected. Unigard thereafter claimed a lien credit against future compensation of $74,466.54, the amount remaining from the recovery after deductions for attorneys' fees and costs. Aitken paid Unigard the money for benefits previously collected, and the credit against future compensation was made pursuant to Arizona's worker's compensation statutory scheme.

Aitken challenged the lien and the credit under two Arizona constitutional provisions[5] which preclude the abrogation of any existing right of action to recover damages for injury, and that no law shall be enacted in Arizona limiting the amount of damages to be recovered for causing the death or injury of any person. Both the administrative law judge in the Arizona Industrial Commission of Arizona and the Court of Appeals of Arizona disagreed with Aitken, and held that Amphitheater and Unigard were entitled to their entire lien under A.R.S. § 23-1023(C) without any reduction, notwithstanding that Aitken's total damages in the third-party suit had been reduced by 25% due to a

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[4]/ There is no explanation why the judgment is $190 less than it should have been under a mathematical analysis, but that is not relevant here.

[5]/ The provisions of the Arizona Constitution are Article 18, § 6 and Article 2, § 31; they are not at issue in this Petition.

finding of fault in that action against the non-party employer Amphitheater. These decisions rested on prior case law which held that an employer's fault was not an issue regardless of how one may view the equity of the matter, and that any change of the lien rights was to be determined by the state legislature.

The Supreme Court of Arizona construed the statutes together without reaching the state constitutional issues. Instead, the court determined that the legislature merely failed to consider the effect of the lien provided for in A.R.S. § 23-1023(C) when it abolished joint liability and established nonparty fault in A.R.S. § 12-2506(B), which includes employer fault. Therefore, the Supreme Court of Arizona filled in what it considered to be the blanks unintentionally left by the legislature, and held in its opinion in this case that the lien is reduced by the amount of reduction of damages in the third-party suit resulting from the non-party employer's negligence as determined in that third-party suit.

Specifically, the Arizona Supreme Court held that an employer/carrier's lien under A.R.S. § 23-1023(C) may be asserted on third-party recoveries only to the extent that the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by verdict in the action. 183 Ariz. at 392, 904 P.2d at 461. The court concluded that "the lien and any future credit should apply only to the extent that compensation benefits paid exceed the *negligent* employer's proportionate share of the total damages awarded in the third-party action." Id. (Emphasis added.)

The Respondents argued that under the principles of *res judicata* and collateral estoppel, a person not a

party to one suit must have a full and fair opportunity to litigate an issue or fact that is to be used against it in any way. (Answering Brief, pp. 23-27, Response to Petition for Review, p. 13, line 15 through p. 14, line 13.) However, the specific assertion that the Arizona Supreme Court's opinion of October 17, 1995 created a taking without due process in violation of the Fifth and Fourteenth Amendments to the federal Constitution were first raised in the motion for reconsideration filed October 31, 1995. The Supreme Court allowed the respondents to supplement their motion for reconsideration and a supplement was filed November 13, 1995, and the court allowed Aitken to file a response, which was filed November 17, 1995. The court also granted the motion of amicus counsel leave to join in the motion for reconsideration and to file an amicus brief, but then denied the motion for reconsideration December 19, 1995, and a mandate was issued January 18, 1996.

ARGUMENTS WHY THIS PETITION SHOULD BE GRANTED

I. The Arizona Supreme Court's decision in this case creates a taking of property without due process by reducing the employer/carrier's lien by a finding of non-party fault, where the employer is not entitled to defend itself, and this affects every worker's compensation case in Arizona involving a third-party tortfeasor.

The lien of A.R.S. § 23-1023(C) is a property right created by statute which attaches to the employee's total recovery from the third party. This property right is protected by the Fifth and Fourteenth Amendments to the United States Constitution, which forbid depriving owners of property without due process of law. Due process of law requires that there be an opportunity to be heard and to present every available defense. The Arizona Supreme Court's decision, reducing the reach of the lien based on a finding of non-party fault in the worker's third party action, takes property from the petitioners herein without providing them with an opportunity to be heard or defend themselves of the alleged negligence which reduces the reach of their lien, and therefore, is a taking in violation of the Fifth and Fourteenth Amendments.

The Arizona Supreme Court's decision in *Aitken* reaches far beyond the parties to this case. It affects

every worker's compensation case in Arizona that also involves a third-party tortfeasor, reducing the employers' or their carriers' liens by the employer's alleged negligence, as determined in a proceeding in which the employer is not entitled to defend itself. Federal due process is denied to the employers/carriers in every single one of those cases.

In prior decisions regarding the lien, the Arizona Supreme Court held that regardless of how one might view the equity of the matter, there was no reduction of the lien of A.R.S. § 23-1023(C) even where the employer was contributorily negligent. *See, e.g., Stroud v. Dorr-Oliver, Inc.*, 112 Ariz. 403, 409, 542 P.2d 1102, 1108 (1975). The lien was deemed to be fair under the system of joint and several liability, because an injured worker would receive worker's compensation from the employer, but would recover 100% of her tort damages from the third-party tortfeasor; the application of the lien avoided a double recovery to the worker, and the employer recovered what it paid out for compensation and medical bills. *See Ruth v. Industrial Commission*, 107 Ariz. 572, 574-76, 490 P.2d 828, 830-32 (Ariz. 1971).

But Arizona abolished joint liability in 1987 by providing in A.R.S. § 12-2506(A) that each party shall be liable only for their own fault, and *no more*. *See Neil v. Kavena*, 176 Ariz. 93, 95, 859 P.2d 203, 205 (Ariz.App. 1993). And in 1991, the Arizona Supreme Court held that the designation of an employer as a non-party at fault was authorized by A.R.S. § 12-2506. *Dietz v. General Electric Co.*, 169 Ariz. 504, 509, 821 P.2d 166, 171 (Ariz. 1991). This introduction of pure comparative fault, including the non-party fault of employers, led the Arizona Supreme Court to stress in *Aitken* that one of the

reasons supporting the lien, the prevention of a double recovery, no longer existed, because the recovery is reduced by the finding of the employer's negligence in the third-party action. *Aitken*, 183 Ariz. at 381-82, 904 P.2d at 460-61. The court states that it is the employer, not the employee, who should lose, despite its earlier rulings in cases such as *Stroud, supra. Id.* The court accepts that the finding against the non-party employer of its negligence is proof that the employer was actually at fault, and that an employer is not to benefit from its own wrong at the expense of the injured worker. *Id.* at 382, 904 P.2d at 461.

Despite the Arizona Supreme Court's right to interpret the Arizona legislature's statutes, goals or policies, or to make law on its own, the court's reduction of the statutory lien takes property in violation of due process rights because the employer has no right to defend itself so as eliminate its alleged fault in the third-party action which reduces its lien. The *Aitken* decision forces the employer to give up lien rights which attach to all amounts collectable in the recovery, and does so without due process.

A lien in property is a property interest under the due process and taking clauses of the Fifth Amendment. *See, e.g., United States vs. Security Industrial Bank*, 459 U.S. 70, 76-77,103 S.Ct. 407, 74 L.Ed.2d 235 (1982). This is true regardless whether the government is taking by eminent domain, or that the taking is from one private owner to give to another. *Id.* Further, the government is acting to deprive someone of their property whenever it enforces private claims to property of one person against another. *See, e.g., Sniadach vs. Family Finance Corp. of Bay View*, 395 U.S. 337, 339-42, 89 S.Ct. 1820, 23

L.Ed.2d 349 (1969) (garnishment action by creditor for debtor's wages require due process).

The lien provided to the employer/carrier under A.R.S. §23-1023(C) is a property right because the statute itself makes the lien attach to the whole amount collectable by the worker from the third party. The statute does not say that the amount actually collectable may be the total recovery; rather, the statue states that it shall be the total recovery. The total recovery is the amount collectable at the time of a judgment or settlement. *State Compensation Fund vs. Nelson*, 153 Ariz. 450, 453, 737 P.2d 1088, 1091 (Ariz. 1987). The Arizona Supreme Court noted in *Nelson*, *supra*, that it is the statute itself that defines the amount to which the lien attaches. *Id.* Other Arizona courts have likewise noted that the lien attaches to the entire recovery at the moment a judgment or settlement occurs. *See,e.g.*, *Polito vs. Industrial Commission*, 171 Ariz. 46, 48, 828 P.2d 182, 184 (Ariz.App. 1992)(stating that the lien attaches to the "entire recovery"); *Mannel vs. Industrial Commission*, 142 Ariz. 153, 156, 688 P.2d 1045, 1048 (Ariz.App. 1984)(lien applies to entire third-party recovery related to all damages, including pain and suffering, loss of pleasures in life, and a spouse's loss of consortium). The Arizona Supreme Court's decision in *Aitken* is a taking of the lien, because it reduces the lien by an amount equal to the reduction in damages in the third-party action, at the same time that the lien attaches to the entire amount collectable in the third-party action.

The taking of a lien requires due process under the Fifth and Fourteenth Amendments. *See, e.g.*, *Penrod vs. Financial Institutions Liquidation Corp.*, 50 F.3d 459, 464 (7th Cir. 1995)(due process satisfied because creditor

could have protected lien by appealing from order confirming plan of reorganization which dealt with its claim). "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane vs. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). "Due process requires that there be an opportunity to present every available defense." *Lindsey vs. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 870, 31 L.Ed.2d 36 (1972).

In *Security Industrial Bank, supra,* at issue was a bankruptcy statute that permitted individual debtors in bankruptcy to avoid possessory, non-purchase money liens on certain property, including household furnishings and appliances. This Court held the statute to apply only prospectively, invalidating liens obtained after the effective date of the statute. In the instance case, the Supreme Court of Arizona's decision is common law, and has the effect of being retroactive as well as prospective, unless otherwise limited by the court. *See Lowing vs. Allstate Ins. Co.*, 176 Ariz. 101, 108, 859 P.2d 724, 731 (Ariz. 1993). The Aitken decision is not limited and is retroactive, and therefore it violates liens existing before the rule was issued. Even had the court's decision been intended to be prospective only (which it isn't), it still violates due process in this case because the rule is applied here to a lien which already attached.

This case is similar in many ways to the case of *Armstrong vs. United States*, 364 U.S. 40, 80 S.Ct. 1563, 41 L.Ed.2d 1554 (1961). There, Armstrong supplied materials to a builder of ship hulls and had materialmen's liens on the hulls until the bills were paid. Meanwhile, and before Armstrong took the steps necessary under Maine law to attach the liens to the vessels, the builder

defaulted under its contract with the United States, and the government took possession of the unfinished hulls pursuant to the contract. Thereafter, the government asserted an immunity to the liens. This Court held that although the liens had not attached, Armstrong was entitled to resort to the specific property for the satisfaction of its claims, and the government's action was a taking and that such a right is compensable by virtue of the Fifth Amendment.

In the instant case, the employer and its carrier were entitled to resort to specific property to satisfy their lien. Instead of being ship hulls, the specific property in this case is the total recovery from the third party. When the Supreme Court of Arizona ordered that the employee may keep a portion of the total recovery, i.e., the total amount collectable from the third party, and that such a portion of that total recovery is not subject to the lien, the court in effect has taken the property from the employer/carrier and given it the employee. As in *Armstrong*, the carrier's right to resort to the total recovery from the third party for the satisfaction of the lien, which is the amount of compensation and medical, surgical and hospital benefits paid along with future credits, is compensable by virtue of the Fifth Amendment.

A difference between the instant case and those cases discussed above is that the lien here is reduced because of what the Supreme Court of Arizona deems to be the employer's own negligence based on an apportionment of fault against the non-party employer in the third-party action under A.R.S. § 12-2506. However, nowhere is the employer's carrier or the employer entitled to notice or permitted to defend against the non-party

finding of fault in the third-party action, even though the result reduces its lien accordingly, and therein lies the taking without due process in violation of the Fifth and Fourteenth Amendment. The finding of non-party fault against the employer is made in an action where the employer has no notice or opportunity to defend. It doesn't matter that the employee theoretically could defend the employer; their interests are not aligned. There is no reason to assume a worker would defend an employer, because the employee easily could be inclined to attempt to apportion any fault to the employer where it cannot be attributed to the third party tortfeasor, and thereby reduce the employer/carrier's lien, and the third party tortfeasor has no reason to care otherwise. In trials to the court, judges can attribute as much fault to the employer as they desire in attempts to protect the worker's recovery from the lien. This is all done without the employer having any opportunity to defend. The employer simply has nowhere to turn, because it has no opportunity to be heard, yet its lien is reduced accordingly. This is fundamentally unfair and an obvious denial of due process.

II. This Court's jurisdiction to grant this petition and review the Arizona Supreme Court's decision has been adequately preserved by the raising of the takings in violation of due process of the Fifth and Fourteenth Amendments in the motion for reconsideration to the Arizona Supreme Court.

Petitioners argued to the Arizona Court of Appeals and the Supreme Court of Arizona the principals of *res judicata* and collateral estoppel, and the requirements that

a person not a party to the first suit must have a full and fair opportunity to litigate the issue. (Answering Brief, pp. 23-27; Response to Petition for Review, p. 13, line 15 through p. 14, line 13.) The essence of that argument is that where the employer has no opportunity to defend itself in the third-party action in which its lien is reduced, then a reduction based on such a finding violates the principles of *res judicata* and collateral estoppel.

The specific reference to the Fifth and Fourteenth Amendments to the Constitution to the United States, and the assertion that this is a taking in violation of the due process clauses of the Fifth and Fourteenth Amendments, was raised in the motion for reconsideration which was timely filed October 31, 1995 following the opinion of the Arizona Supreme Court on October 17, 1995. The Supreme Court of Arizona allowed these petitioners to supplement the motion for reconsideration, allowed amicus counsel to join the petitioners in the motion for reconsideration, and allowed Aitken to file a response. The court denied the motion for reconsideration December 19, 1995, without opinion.

This Court has jurisdiction to grant certiorari review of constitutional claims that were raised in the Arizona Supreme Court on motion for reconsideration.[6] *See Bankers Life & Casualty Company vs. Crenshaw*, 486

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[6]/ A motion for reconsideration took the place of a request for rehearing in the appellate courts of Arizona. *See* comment following 1983 amendment to Rule 22, Arizona Rules of Civil Appellate Procedure, Vol. 17B, Arizona Revised Statutes Annotated (1988), in Appendix at A-50 through A-52.

U.S. 71, 77, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988). Such jurisdiction exists even if there is a procedural bar in the state court to hearing a claim first raised on a petition for rehearing, if the state court does not strictly or regularly follow such a procedural rule precluding review of issues raised for the first time in a petition for rehearing. *See Hathorn vs. Lovorn*, 457 U.S. 255, 262-65, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). A procedural rule which is subject to discretion is not applied regularly. *See, e.g., Johnson vs. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988).

In *Bankers Life, supra,* this Court held that references in a rehearing petition that constitutional principles were violated, but without reference to what constitutional provisions were allegedly violated, was insufficient to preserve for this Court the review of those issues, which were that the decision violated the due process clause or contracts clause of the federal Constitution. 486 U.S. at 76-77. This Court then inferred that had the due process and contract clauses specifically been referenced in the petition for rehearing, they would have adequately been raised even though the Mississippi Supreme Court denied the Petition for Rehearing. *Id.* at 77.

The Petitioners' motion for reconsideration in this case was filed pursuant Rule 22 of the Arizona Rules of Civil Appellate Procedure, which provides that the contents of the motion " ... shall be directed solely to discussion of those specific points or matters in which it is claimed the appellate court erred in determination of facts or law." However, the Supreme Court of Arizona has discretion to hear a constitutional issue on appeal, at any time during the pendency of the appeal, where the

issue is of statewide public importance and does not require any new facts to be determined. *Barrio vs. San Manuel Division Hospital*, 143 Ariz. 101, 104, 692 P.2d 280, 283 (Ariz. 1984); *Rubens vs. Costello*, 75 Ariz. 5, 251 P.2d 306 (Ariz. 1952); *Hawkins vs. Allstate Ins. Co.*, 152 Ariz. 490, 502-03; 733 P.2d 1073, 1085-86 (Ariz. 1987)(court declined to exercise its discretion to hear new constitutional issue).[7] In *Love vs. Bracamonte*, 29 Ariz. 537, 241 P. 514, 515 (Ariz. 1925), the court refused to consider arguments raised for the first time on rehearing, but the propositions urged for the first time in *Love* were not constitutional issues of statewide importance, and no general rule was announced for all cases by the court in *Love*. The court will exercise its discretion to hear newly raised constitutional issues where the public interest is better served by having the issued considered rather than deferred. *Dombey vs. Phoenix Newspapers*, 150 Ariz. 476, 482, 724 P.2d 562, 568 (Ariz. 1986).

The Arizona Supreme Court's decision in *Aitken* immediately impacts every worker's compensation case and connected civil suit involving issues and findings of the employer's non-party fault, and does not require the determination of any new facts, and the issue is one which should be resolved earlier rather than being deferred. Therefore, the constitutional issues raised in the motion for reconsideration are issues which the Arizona Supreme Court could have heard within the framework of applying its discretion, as described above. Further, since

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[7]/ These principles above have been applied by another court to issues first raised in a motion for rehearing after a decision. *See In re Riverton State Bank*, 49 P.2d 637, 638 (Wy. 1935).

the Supreme Court of Arizona denied the motion for reconsideration without opinion, this Court should not even conclude that the state court applied any type of procedural bar. *See Harris vs. Reed*, 489 U.S. 255, 261-66, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Michigan vs. Long*, 463 U.S. 1032, 1042, and n.7, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)(required that a plain statement that a procedural bar is applied, otherwise this Court should infer that no procedural bar was employed.)

For all the foregoing reasons, this Court has jurisdiction to grant and should grant the Petition for Writ of Certiorari in this matter.

CONCLUSION

The Arizona Supreme Court's decision in *Aitken* affects not only the instant case, but every worker's compensatiase in Arizona involving a third-party tortfeasor. Federal due process is denied to the employers or their carriers in every single one of those cases, because the lien is reduced, and therefore is taken, without the due process required by the Fifth and Fourteenth Amendments to the federal Constitution.

Respectfully submitted, March 15, 1996
Mailed by U.S. Postage March 15, 1996

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TABLE OF CONTENTS

Page

Appendix A: Opinion of Supreme Court of Arizona in *Aitken v. Industrial Commission* (filed October 17, 1995) A-1

Appendix B: Opinion of the Court of Appeals in *Arizona in Aitken v. Industrial Commission*, (filed May 14, 1992) A-17

Appendix C: Decision Upon Review Affirming Findings and Award Establishing Third Party Lien (Filed August 6, 1991) A-26

Appendix D: Findings and Award Establishing Third Party Lien (Filed May 8, 1991) A-28

Appendix E: Supreme Court of Arizona Clerk's Notice of Order Denying Motion for Reconsideration, dated December 21, 1995 A-36

Appendix F: Mandate, dated January 18, 1996 A-38

Appendix G: Constitutional Provisions, Statutes, and Rules Involved

1. Fifth Amendment to the United States Constitution A-40

2. Fourteenth Amendment to the United States Constitution A-40

	Page
3. 28 U.S.C. 1257	A-42
4. 28 U.S.C. § 2403(b)	A-42
5. Ariz.Rev.Stat.Ann. § 12-2506 (prior to 1993 amendments, and in effect when the administrative law judge issued his Findings and Award on May 8, 1991, and his Decision upon Review Affirming the Award, on August 6, 1991, and when the Arizona Court of Appeals issued its opinion in *Aitken v. Industrial Commission* on May 14, 1992)	A-43
6. Ariz.Rev.Stat.Ann. § 12-2506 (with 1995 amendments, in effect when Supreme Court of Arizona issued its opinion in *Aitken v. Industrial Commission* on October 17, 1995.)	A-45
7. Ariz. Rev. Stat. Ann. § 23-1023	A-48
8. Rule 22, 17B, Ariz.Rev. Stat.Ann, Arizona Rules of Civil Appellate Procedure (including historical notes)	A-50

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

FAITH AITKEN,

Petitioner Employee,

v.

INDUSTRIAL COMMISSION OF ARIZONA

Respondent,

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

Supreme Court
No. CV-92-0257-PR

Court of Appeals
No. 2 CA-IC 91-0042

Industrial Commission
No. 374-78-9448

Carrier
No. A056140

O P I N I O N

[Filed October 17, 1995]

Appeal from the Industrial Commission
Administrative Law Judge Jerry C. Schmidt
AWARD SET ASIDE

Opinion of the Court of Appeals, Division Two
173 Ariz. 300, 842 P.2d 1313 (Ct. App. 1992)
VACATED

Dee-Dee Samet, P.C.
by Dee-Dee Samet and Arthur V. Gage
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OPINION

ZLAKET, Justice.

Petitioner, Faith Aitken, while in the scope of her employment with Amphitheater School District, was seriously injured when she fell in an area where a sidewalk had been removed by Maya Construction Company. She filed a workers' compensation claim and received $28,929.70 in benefits from her employer's carrier, Unigard Insurance Co. She also filed a third party suit against Maya, which responded by alleging her contributory negligence and naming the school district a nonparty at fault.

A jury in the third party action assessed total damages of $319,292 and apportioned responsibility as follows: 65% to Maya, 25% to Amphitheater, and 10% to Aitken. After reducing the award by the employer's and Aitken's percentages of fault, the court entered judgmentnt against Maya in the amount of $207,350.[1]

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[1] The reduction amounted to $79,823 for Amphitheater's negligence and $31,929 for Aitken's. The reader with an eye for detail may note that when the sum of these two numbers is subtracted from the verdict, the remainder is $207,540 rather than the judgment amount of $207,350. We can find no explanation in the record for this minor discrepancy, but it is unimportant to our decision.

From this sum, petitioner reimbursed Unigard $28,929.70 for benefits previously collected. The carrier thereafter claimed a lien credit against future compensation of $74,466.54, the amount remaining from the recovery after deductions for attorneys' fees and costs.

Aitken asserted that both the lien and the credit were excessive. She also challenged their constitutionality under Article 18, Section 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."); Article 18, Section 8 (requiring the establishment of "a just and humane compensation law ... for the relief and protection of [injured or deceased] workmen, their widows, children or dependents ... from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefor"); and Article 2, Section 31 ("No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person.") of the Arizona Constitution. More particularly, she argued that the lien statute, A.R.S. § 23-1023(C), operates in combination with a more recent measure abolishing joint and several liability, A.R.S. § 12-2506, to produce an unconstitutional result.

The administrative law judge found in favor of the carrier, holding that the lien could not be reduced merely because the insured employer shared responsibility for petitioner's injuries. The court of appeals affirmed, finding that an injured worker who has received compensation must fully reimburse the carrier even though the total damages assessed in a third party action

have been diminished by the employer's percentage of fault. Aitken v. Industrial Comm'n, 173 Ariz. 300, 302, 842 P.2d 1313, 1315 (Ct.App.1992). We granted review.

A. Constitutionality of A.R.S. Sec. 23-1023

We "usually will not determine the constitutionality of a statute when the case can be decided without ruling upon such question." State v. Church, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973).

> Indeed, it is well-settled that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary in order to determine the merits of the suit in which the constitutionality of such statute has been drawn in question, and such rule should not be departed from except for strong reason and under extraordinary circumstances.

County of Maricopa v. Anderson, 81 Ariz. 339, 341, 306 P.2d 268, 269 (1957) (quoting 16 C.J.S. Constitutional Law § 94, at 307). We do not find these circumstances to be present here.

Consistent with our "duty to construe a statute so as to give it, if possible, a reasonable and constitutional meaning," Arizona Downs v. Ariz. Horsemen's Found., 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981), we must make every effort to harmonize these legislative acts. Fortunately, because the underlying purposes of the lien statute and the broader objectives of the workers' compensation scheme are clear and well understood, we

are able to reach a reasonable interpretation of the law that comports with legislative intent without having to address the foregoing constitutional challenges.

B. Interpreting the Lien Statute

In addition to collecting workers' compensation benefits, an injured employee may sue a third party who caused or contributed to his or her injuries. A.R.S. Sec. 23-1023(A). If the employee successfully recovers against the third party tortfeasor, Sec. 23-1023(C) allows the employer or its carrier to assert a lien on the recovery. This lien applies to "the total recovery less the reasonable and necessary expenses, including attorneys' fees." A.R.S. § 23-1023(C). Before the legislature abolished or severely restricted joint and several liability in A.R.S. § 12-2506, a literal reading of the lien statute did not detract from the overall purpose of the workers' compensation scheme, which is to protect injured employees. See Stephens v. Textron, Inc., 127 Ariz. 227, 230, 619 P.2d 736, 739 (1980); State ex rel. Industrial Comm'n v. Pressley, 74 Ariz. 412, 418, 250 P.2d 992, 996 (1952). Those who paid compensation obtained liens on "total" recoveries from third party tortfeasors who were, under the law existing at the time, responsible for all damages regardless of how big or small their respective portions of liability might have been. Thus, even when employers shared responsibility for the injuries, their employees received a full measure of damages from third parties whose conduct contributed to the result.

The law has changed. Joint and several liability has been effectively abrogated. Moreover, in Dietz v. General Elec. Co., 169 Ariz. 505, 510, 821 P.2d 166, 171

(1991), we held that under A.R.S. Sec. 12-2506(B) an employer liable for workers' compensation can be designated a nonparty at fault in a claimant's suit against a third party. Therefore, judges or juries in such cases must now assign, when appropriate, a percentage of fault to the employer. As we recognized in Dietz, although this method of apportionment is in accord with the overall legislative objective of holding parties liable only for their own wrongdoing, it may work an injustice on claimants in the lien context. Id. at 511, 821 P.2d at 172. Once employees accept compensation, they give up their rights to sue negligent employers. See A.R.S. § 23-1022(A). Yet, without an equitable adjustment or apportionment, employers and their carriers will continue to obtain full liens against third party recoveries even where those awards have been effectively reduced by virtue of the employers' own fault. The result is a diminution of the injured claimant's total recovery that appears quite inconsistent with the overall goal of Arizona's compensation scheme.[2]

We are not alone in this view. Our court of

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[2] In the instant case, for example, not only are the Aitkens unable to sue Amphitheater to recover the 25% of their damages attributable to the school district's conduct, but under the appellate court's present construction of A.R.S. § 23-1023(C), they must fully reimburse the district's carrier, Unigard, for benefits already received. Moreover, Unigard is able to assert a lien against the Aitkens' recovery for compensation benefits it may be obligated to pay in the future, without any deduction for its insured's contribution to the injuries.

appeals pointedly questioned "the equity of this outcome--that the employee, whose damages have already been reduced by 25%, reflecting Amphitheater's proportionate share of fault, must nevertheless reimburse Amphitheater's carrier for 100% of the benefits received." Aitken, 173 Ariz. at 302, 842 P.2d at 1315. And in Sullivan v. Scoular Grain Co., 853 P.2d 877 (Utah 1993), where the court held that Utah's Liability Reform Act requires a jury to apportion the fault of a plaintiff's employer even though the latter is immune from suit under workers' compensation laws, the majority candidly noted:

> Plaintiff also protests the detrimental effect on his recovery created by the employer reimbursement provisions of the Workers' Compensation Act. Section 35-1-62 provides for an employer or insurer to obtain reimbursement for any payments made to an injured employee. This lien is not reduced in any respect by the amount by which the employer's act or omission contributed to the employee's injuries....
>
> Consequently, when a verdict is granted to the plaintiff in an amount equal to or greater than the employer's workers' compensation payments, the Act allows an at-fault employer to escape liability altogether at the expense of the injured employee. We agree with plaintiff that this result is inequitable, but the effect of the statutory language is clear.

Id. at 883 (emphasis added) (footnote omitted).

The dissent in Sullivan expressed the thought more strongly:

> Thus, not only is the plaintiff made responsible for the employer's proportionate share of fault, but he must also reimburse his employer out of his diminished recovery for any workers' compensation benefits received. This is not only unjust and inequitable, but might well be unconstitutional.

853 P.2d at 887 (Stewart, J., dissenting) (emphasis added).

In Taylor v. Delgarno, 100 N.M. 138, 667 P.2d 445 (1983), the Supreme Court of New Mexico, by a 3-2 vote, opted to leave a similar issue to the legislature. The dissenting justices, however, saw no reason for judicial inaction and commented:

> We would therefore hold that the comparative negligence doctrine should be read in conjunction with the workmen's compensation statutes to require that an employer or its workmen's compensation carrier should be reimbursed from monies recovered by the injured workman from a third-party tort-feasor only in those instances where the employer or its insurer has paid more than its proportionate share of the employee's damages. On no occasion would the employer or its insurer be subjected to greater liability than that allowed by the Workmen's Compensation

> Act. There should, of course, be no reimbursement in those cases in which the employer's share of liability is greater than or equal to the amounts paid under workmen's compensation because such reimbursement would be at the expense of the injured worker. Reimbursement to a negligent employer or its insurer should occur only when the amounts paid in workmen's compensation benefits exceed the employer's proportionate share of liability and the employee is able to recover additional sums from a third-party tort-feasor because only in this instance would the employee enjoy a double recovery. Reimbursement to a negligent employer or its insurer in any other instance would be at the expense of the injured workman and would allow a negligent employer to escape even the limited liability imposed by the Workmen's Compensation Act.

667 P.2d at 449-50 (Payne, C.J., and Sosa, J., dissenting).

We concur that this issue is capable of judicial resolution, particularly given our past knowledge of and experience with the lien statute. See, e.g., Carter v. Industrial Comm'n, 182 Ariz. 128, 893 P.2d 1291 (1995); Liberty Mut. Ins. Co. v. Western Cas. & Sur. Co., 111 Ariz. 259, 527 P.2d 1091 (1974). Here, we do not deal with some novel, untested law. We know exactly how A.R.S. Sec. 23-1023(C) is supposed to operate and what it was designed to accomplish because we have been working with and applying it since its enactment in the

mid-1960s. We agree with the court of appeals that when the Arizona legislature passed this statute, it did not anticipate the manner in which compensation liens would operate outside the universe of joint and several liability,[3] which continued to exist as the law in this state for another twenty-two years. Nor is there evidence that the legislature considered this question in 1987 when A.R.S. Sec. 12-2506 was adopted. In fact, some might argue that we created the "problem" by our 1991 decision in Dietz and, therefore, that it should be amenable to a judicial solution. In any event, we cannot agree with the suggestion that our courts are powerless to compensate for the clearly unintended consequences of these recent developments in the law, by which a reimbursement mechanism that has been fairly and successfully applied for decades is effectively subverted. Courts should not limit themselves to the rigid construction or application of a statute when significant changes in circumstance since its enactment produce results plainly contrary to legislative intent. Consumers Union v. Heimann, 589 F.2d 531, 534 (D.C.Cir.1978) (citing Perry v. Commerce Loan Co., 383 U.S. 392, 397-400, 86 S.Ct. 852, 855-57, 15 L.Ed.2d 827 (1966)). "Construing a statute in light of subsequent events is fully consistent with our obligation to carry out Congress['s] intent at the time of enactment." Idaho v. Hodel, 814 F.2d 1288, 1298 (9th Cir.) (Reinhardt, J., concurring and dissenting), cert. denied sub nom. Coeur D'Alene Tribe v. Idaho, 484 U.S. 854, 108 S.Ct. 159, 98 L.Ed.2d 114 (1987). It is clear that in adopting A.R.S. § 23-1023, the legislature wanted to encourage suits against culpable third parties, thereby relieving some of the compensation burden on employers,

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[3] See Aitken, 173 Ariz. at 303, 842 P.2d at 1316.

their insurance carriers, and the system. Liens against third party awards not only facilitate the spreading of loss but provide a valuable safeguard against double recoveries by claimants. Henshaw v. Mays, 20 Ariz.App. 300, 306, 512 P.2d 604, 610 (1973).

Thus, a reasonable balance between the rights of employer and employee, consistent with the underlying goals of the compensation scheme, has existed for more than twenty years. That balance appears to have been skewed by the almost complete abolition of joint and several liability. We recognized this dilemma in Dietz and specifically left open the possibility of limiting a carrier's lien when its insured, the employer, is found at fault to some degree. 169 Ariz. at 511, 821 P.2d at 172. We now hold that a carrier may assert a lien on a third party recovery only to the extent that the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by verdict in the action. In doing so, we are particularly mindful of the "context, subject matter, and effects and consequences of the statute." Calvert v. Farmers Ins. Co., 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985). We interpret and apply laws so as to further "the general legislative goals that can be adduced from the body of legislation in question." Dietz, 169 Ariz. at 510, 821 P.2d at 171. One of the fundamental objectives of the legislature in abolishing joint and several liability was to make each tortfeasor responsible for his or her share of fault. Id.

Moreover, we have consistently applied workers' compensation laws liberally, remedially, and in a manner ensuring that injured employees receive maximum available benefits. See, e.g., English v. Industrial Comm'n, 73 Ariz. 86, 89, 237 P.2d 815, 817 (1951);

Pressley v. Industrial Comm'n, 73 Ariz. 22, 28, 236 P.2d 1011, 1015 (1951). The overriding theme of the system, as evidenced by our constitution, statutes, and case law, has been to preserve a claimant's opportunity to be made whole to the fullest possible extent--nothing more nor less.

At the same time, the lien statute acts to promote fairness among all parties. That goal is not served by allowing "an employer to benefit from his own wrong, at the expense of the injured worker," nor is such a scenario "consistent with the principles of comparative fault." Clark v. Pacificorp, 118 Wash.2d 167, 822 P.2d 162, 174 (1991). There is no indication that the statute was intended to result in a windfall for any party, be it the employee, employer, or insurance carrier. We should therefore continue to interpret it in a manner that achieves the legislative objectives of distributing responsibility according to fault and avoiding double recovery while ensuring full and fair recompense. Because any other interpretation "would be at the expense of the injured workman," Taylor, 100 N.M. at 143, 667 P.2d at 450 (Payne, C.J., and Sosa, J., dissenting), we conclude that the lien and any future credit should apply only to the extent that compensation benefits paid exceed the negligent employer's proportionate share of the total damages awarded in the third party action. In other words, the employee should not be forced to endure the combined effect of first having his or her award reduced by reason of the employer's fault, and thereafter having to satisfy a lien against this diminished recovery in favor of the employer and its carrier to the full extent of compensation benefits provided. If injured claimants stand to gain little or nothing by invoking both the workers' compensation and the tort systems, there will

scarcely be any incentive for them to pursue responsible third parties.

Respondents argue that we should uphold the right to complete reimbursement because a purpose of the lien statute is to protect the compensation fund and prevent workers from becoming public charges. If we do not allow the employer or its carrier to recoup all benefits paid, respondents assert, the compensation fund might soon be exhausted. There is, however, no evidence in the record to support such a gloomy prediction. The argument also overlooks the fact that replenishing the fund was only one of the reasons that the legislature provided for a carrier's lien. It primarily sought to prevent employees from receiving a double recovery and "to avoid the possibility that no action would ever be instituted against the third party tortfeasor." Henshaw, 20 Ariz.App. at 306, 512 P.2d at 610.

Respondents further claim that the language of A.R.S. § 12-2506(B) prohibits using a nonparty's fault in determining the amount of the carrier's lien. What the statute actually provides, however, is that "[a]ssessment of fault against nonparties does not subject any nonparty to liability in this or any other action and it may not be introduced as evidence of liability in any action." (Emphasis added.) Reducing the lien based on the employer's proportionate share of fault does not subject the employer to any liability; it merely affects the amount of reimbursement the employer or its carrier receives. See Taylor, 100 N.M. at 142, 667 P.2d at 449 (Payne, C.J., and Sosa, J., dissenting).

Respondents finally assert, as the court of appeals concluded, that the proposed construction of the lien

statute injects fault into a no-fault scheme. However, in the context of efficiently and expeditiously providing compensation to injured workers, which is what the system is designed to do, fault remains no consideration. In third party suits, fault has always been a matter of inquiry and remains so. Despite the fact that it is now appropriate for fact finders to apportion fault among all of the various parties and nonparties in tort actions, today's ruling changes none of the traditional principles governing the payment of compensation; only the amount of reimbursement is affected. But even assuming that, to a limited extent, fault is brought into play by such an adjustment, the result is nevertheless reasonable and compatible with the need for a "just and humane compensation law in the State of Arizona." Ariz. Const. art. 18, § 8.

In adopting a rule of equitable apportionment, we are able to avoid a constitutional attack on the lien statute and preserve its primary justification--the fullest available recovery without double recovery. Respondents' suggestion that our decision constitutes a rewriting of A.R.S. § 23-1023 is without merit. We are simply making it function as closely as possible to the way in which it has always operated and in accord with what appears to have been the intent of the legislature at the time of its passage. It makes little sense to say that rules of construction prevent us from applying a statute in a manner consistent with its application and use these past many years. We find nothing to indicate that the legislature was unhappy with or intended to change the way in which the lien statute had been working. However, if our decision today misconstrues legislative intent, that body can tell us so by taking appropriate action.

The award is set aside, the opinion of the court of appeals is vacated, and the case is remanded.

Thomas A. Zlacket, Justice.

CONCURRING:

Stanley G. Feldman, Chief Justice

James Moeller, Vice Chief Justice

Robert J. Corcoran, Justice

Frederick J. Martone, Justice

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

Faith Aitken
Petitioner Employee

CA-IC 91-0042
DEPARTMENT A

v.

OPINION

Industrial Commission of Arizona
Respondent

[Filed May 14, 1992]

Amphitheater Public Schools,
Respondent Employer,

Unigard Insurance Company,
Respondent Carrier.

Special Action - Industrial Commission
ICA Claim No. 374-78-9448
Carrier No. A065140
Administrative Law Judge Jerry C. Schmidt
AWARD AFFIRMED

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L I V E R M O R E, Chief Judge

Faith Aitken was employed by Amphitheater School District when she fell after stepping out of a doorway into an area where the sidewalk had been removed by Maya Construction Company. She filed a claim for workers' compensation benefits and has to date received $28,929.70 in medical and compensation benefits from Unigard Insurance, Amphitheater's insurance carrier. She, and her husband asserting loss of consortium, then filed a third-party negligence claim against Maya Construction. Maya Construction in turn

alleged comparative negligence and brought Amphitheater in as a non-party at fault. The jury awarded the plaintiffs $319,292 in damages and assessed the percentage of fault as 65% Maya's, 25% Amphitheater's, and 10% Aitken's. Reducing the judgment by $79,823 and $31,929 respectively for Amphitheater's and Aitken's comparative negligence, the court awarded Aitken and her husband "jointly and equally as husband and wife" the sum of $207,350. From this judgment Aitken reimbursed Unigard the $28,929.70 it had paid in benefits, but objected to Unigard's claim of credit in the amount of $74,466.54[4] against future benefits. She requested a hearing, arguing that the lien was too high given the employer's degree of fault, was unconstitutional, and should not attach to the husband's portion of the award for loss of consortium. The administrative law judge found in favor of Unigard, holding that the carrier's lien cannot be reduced by the employer's degree of fault and that it attaches to the husband's award for loss of consortium. The award was affirmed on review.

In this special action Aitken raises three issues for review: whether the carrier's lien is limited to the amount of benefits paid which exceed the employer's proportional share of damages, whether the lien provisions of A.R.S. § 23-1023 violate the non-abrogation and non-limitation clauses of Arizona's Constitution, and whether the lien extends to a spouse's loss of consortium award absent a claim of death benefits.

---

[4]/[Footnote 1 in opinion] This sum was arrived at by deducting from the $207,350 award the $28,929.70 reimbursed to Unigard as well as attorneys' fees and costs.

In Arizona, a worker who does not opt out of the workers' compensation scheme before being injured accepts workers' compensation as his or her sole remedy against the employer. Ariz. Const. art. 18, § 8; A.R.S. §§ 23-906(A) and 23-1022. By so doing, the worker gives up the right to sue the employer and the prospect of a large damage award in exchange for prompt, though limited, compensation.[5] The employee remains free to sue a third party for its negligent contribution to the injury, but the employer or its carrier has a lien on any damages recovered to the extent of the benefits paid, as well as a credit against future benefits to the extent of the recovery. A.R.S. § 23-1023. The lien, which is levied in part for the purpose of preventing double recovery by the injured worker, applies to "the amount actually collectable" from the third party recovery, defined by A.R.S. § 23-1023(C) as being "the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery."

The Uniform Contribution Among Tortfeasors Act (UCATA), A.R.S. §§ 12-2501 et seq., enacted in 1984, allowed a defendant to recoup damages it paid to a plaintiff from other joint tortfeasors, but specifically prevented joint tortfeasors from asserting contribution

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[5]/ [Footnote 2 in opinion] Historically, the employer in turn gave up its right to common law defenses against the employee in return for limited liability. As Arizona is now a pure comparative negligence state and no longer recognizes the "unholy trinity" of contributory negligence, assumption of the risk, and the fellow servant doctrine, the exchange is, arguably, less than equal.

claims against employers, who were statutorily immune. A.R.S. § 12-2501(H). See also Dietz v. General Electric Co., ___ Ariz. ___, 821 P.2d 166 (1991). In 1987, however, our legislature enacted § 12-2506 abolishing joint liability and adopting instead a pure comparative fault system whereby the fault of all tortfeasors is considered "regardless of whether the person was, or could have been, named as a party to the suit." A.R.S. § 12-2506(B). Finding that this latter statute prevails over § 12-2501(H), prohibiting the assessment of non-party fault against immune employers, our supreme court in Dietz, supra, held that "[w]hen an employer negligently contributes to an employee's injury, the joint tortfeasors may require the employer's negligence to be considered for the assessment of fault under A.R.S. § 12-2506." Dietz, ___ Ariz. at ___, 821 P.2d at 172. The court specifically left for decision at a later time the issue of whether an employer or its carrier should be reimbursed from a third-party recovery "only in those instances where the employer or its insurer has paid more than its proportionate share of the employee's damages." Id., quoting Taylor v. Delgarno Transport, Inc., 100 N.M. 138, ___, 667 P.2d 445, 449 (1983) (Payne, C.J., and Sosa, Senior J., dissenting).

The first issue we are asked to decide, therefore, is one of first impression in Arizona: Should the lien of an employer or its insurance carrier against the injured employee's recovery in a third-party action be reduced by the degree of fault attributed to the employer in that action?

Workers' compensation arose to meet the dual problems of increasing industrial injuries due to the industrial revolution, and inadequate compensation for

those injuries due to common law defenses that worked against the injured employee. Because most industrial injuries are attributable to the inherent risks of employment as opposed to anyone's fault, it developed as a no-fault system designed to shift the burden of economic loss from the individual and society as a whole onto industry. See generally 1 A. Larson, The Law of Workmen's Compensation § 4 (1990); Ossic v. Verde Central Mines, 46 Ariz. 176, 49 P.2d 396 (1935). One of the basic tenets of the workers' compensation system, therefore, is that fault not be interjected into its workings. To rule that a carrier's lien must be reduced by the employer's proportionate share of fault would do just that. Moreover, the language of § 23-1023(C) simply could not be more precise: The carrier's lien is "on the amount actually collectable" from the third party, in this case $207,350.

While we cannot help but question the equity of this outcome -- that the employee, whose damages have already been reduced by 25%, reflecting Amphitheater's proportionate share of fault, must nevertheless reimburse Amphitheater's carrier for 100% of the benefits received--we are bound by the rules of statutory construction to give effect to the clear and unequivocal meaning of the language used by the legislature. Janson v. Christensen, 167 Ariz. 470, 808 P.2d 1222 (1991). Although undoubtedly the legislature, when it enacted § 23-1023, did not have in mind its effect under a subsequent comparative negligence scheme, it is for the legislature, and not the courts, to make any necessary adjustments in the law.

Aitken argues next that § 23-1023(C) as applied in this case violates Ariz. Const. art. 18, § 6, prohibiting

the abrogation of a cause of action, and Ariz. Const. art. 2, § 31, prohibiting limitations on the amount of damages to be recovered for causing the death or injury of a person. We disagree. The constitutionality of the comparative negligence statutes allowing a plaintiff to collect from a third party only the damages for which it is responsible has been upheld by our supreme court, City of Phoenix v. Superior Court, 149 Ariz. 143, 717 P.2d 447 (1986), as has the assessment of fault against a non-party, statutorily immune employer, Dietz, supra. The court in Dietz went even further to hold that the lien provisions of § 23-1023(C) "are part of the trade-off contemplated in the constitution -- common law tort rights for no-fault workers' compensation benefits," Ariz. Const. art. 18, § 8, and "[i]n that regard, [are not] a limitation on the amount of damages recoverable...." Dietz, ___ Ariz. at ___, 821 P.2d at 172. For the same reason stated in Dietz, that Aitken had the option of suing Amphitheater and collecting the full amount of the judgment but chose instead to accept the trade-off offered by workers' compensation, we fail to see how the lien provisions abrogate Aitken's cause of action against Amphitheater. A.R.S. §§ 23-906(A) and 23-1022(A); Anderson v. Industrial Commission, 147 Ariz. 456, 461, 711 P.2d 595, 600 (1985). Practically in this case there is a potential reduction of the damages recoverable from third parties because of the application of the workers' compensation lien. That, too, it would seem is part of the constitutional trade-off.

As to the final issue, both the statutory language and the case law are clear that the carrier's lien extends to the total third party recovery, including that portion attributable to a spouse's loss of consortium. A.R.S. § 23-1023(C); Mannel v. Industrial Commission, 142 Ariz.

153, 688 P.2d 1045 (App.1984), cert. den., 469 U.S. 1212, 105 S.Ct. 1183, 84 L.Ed.2d 331 (1985). In Mannel the court held:

> If a lien is allowed, it applies to the entire third party recovery (less expense and attorney's fees), even though this recovery includes damages not compensated under workers' compensation (such as pain and suffering, loss of pleasures in life, and a spouses' loss of consortium).

Id. at 156, 688 P.2d at 1048. What is less clear in this particular case is whether the carrier's credit attributable to the recovery for loss of consortium offsets only future death benefits. In Martinez v. Industrial Commission, 168 Ariz. 307, 812 P.2d 1125 (App.1991), Division One of this court held that while the carrier's lien attaches to the entire recovery, the credit attributable to the recovery for loss of consortium offsets only potential future death benefits. Unlike the award here, however, which was awarded "jointly and equally" to the employee and her husband, the award in Martinez was segregated. While Aitken urges us to interpret "jointly and equally" to mean that 50% of the damages were attributable to the husband for loss of consortium, any determination to that effect should have been made in the trial court and neither we nor the administrative law judge are in a position to second-guess what was intended. We hold therefore that, as to the carrier's credit, Martinez does not apply. For the same reasons set forth above, that the employee had the option to reject workers' compensation and pursue a third-party judgment free from any employer's lien, the carrier's lien is constitutional and not an abrogation of her right to bring a claim for full damages.

Award affirmed.

_____

JOSEPH M. LIVERMORE, Chief Judge

CONCURRING:

_____

MICHAEL A. LACAGNINA, Presiding Judge

_____

LAWARENCE HOWARD, Judge

APPENDIX C

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

Faith Aitken
Applicant

v.

I.C.A. Claim No. 374-78-9448
Carrier No. A065140

Amphitheater Public Schools,

Defendant Employer,

Date Of Injury: 5-18-88

Unigard Insurance Company,
Defendant Carrier.

Decision Upon Review
Affirming Findings and
Award Establishing
Third Party Lien

Heretofore, on May 8, 1991, FINDINGS AND AWARD ESTABLISHING THIRD PARTY LIEN was issued by this Administrative Law Judge.

Thereafter, on June 6, 1991 REQUEST FOR REVIEW was filed by the applicant. RESPONSE TO REQUEST FOR REVIEW was filed on June 21, 1991.

This Administrative Law Judge, having fully reconsidered the file, records and all materials hereunto appertaining, now enters his DECISION UPON REVIEW AFFIRMING FINDINGS AND AWARD

ESTABLISHING THIRD PARTY LIEN as follows:

FINDINGS

The FINDINGS AND AWARD ESTABLISHING THIRD PARTY LIEN hereto entered on May 8, 1991 is fully supported by the evidence and is hereby affirmed.

AWARD

IT IS ORDERED that the FINDINGS AND AWARD ESTABLISHING THIRD PARTY LIEN heretofore entered on May 8, 1991 be, and the same is hereby affirmed.

- - - - - -

NOTICE: Any party dissatisfied with this Decision Upon Review may apply to the Court of Appeals of the State of Arizona, Division One, for a review of the lawfulness of this Decision pursuant to the provisions of Arizona Revised Statutes Secs. 23-951 A and 12-120.21 B. See also Rule 10, Rules of Procedure for Special Actions, Arizona Revised Statutes, 17 A. Unless such application is made within THIRTY (30) DAYS after the mailing hereof, this Decision shall be final. Arizona Revised Statutes Sec. 23-943 H.

By

_____

JERRY C. SCHMIDT
Law Judge

JCS:bes
DATED MAILED IN TUCSON, ARIZONA THIS 6TH DAY OF AUGUST 1991.

APPENDIX D

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

Faith Aitken
Applicant

v.

Amphitheater Public Schools,
Defendant Employer,

Unigard Insurance Company,
Defendant Carrier.

I.C.A. Claim No. 374-78-9448
Carrier No. A065140
Date of Infury: 5-18-88

Findings and Award Establishing Third Party Lien

Heretofore, on June 7, 1988 the applicant filed a claim for workers' compensation benefits for an industrial injury sustained while employed by the above-named defendant employer on May 18, 9188[sic].

The applicant's claim was accepted and remains open for benefits. On December 20, 1990 the defendant insurance carrier herein issued a Notice of Credit claiming a lien arising out of a third party civil action in Superior Court.

Thereafter, on January 14, 1991 the applicant filed a REQUEST FOR HEARING and pursuant thereto, formal hearing was scheduled to have convened in Tucson, Arizona on April 18, 1991. The applicant is represented by Mr. Arthur V. Gage while the defendants

are represented by Mr. J. Michael Moeller. Prior to the convening of formal hearing the parties stipulated to submit the matter on the basis of the material contained in the Industrial Commission file and simultaneous memoranda.

FAITH AITKEN

The undersigned, having fully considered the file, record and all matters hereunto appertaining, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. On May 18, 1988 the applicant was employed by the above named defendant employer who at said time was insured under the provisions of the Arizona workers' compensation act against liability for the payment of medical, surgical, hospital and/or compensation benefits by the defendant insurance carrier herein.

2. On May 18, 1988 the applicant sustained an industrial injury while in the course and scope of her employment with the defendant employer, Amphi Public Schools. The applicant thereafter received and continues to receive Worker's Compensation benefits pursuant to the Arizona Workers' Compensation Act. The applicant then brought an action into Superior Court for damages against a third party tort feasor, Maya Construction Company. The full damages were determined to be $319,292.00, the applicant guilty of 10% comparative fault and the non-party employer guilty of 25% comparative fault. The threshold question which must be addressed is whether the carrier's lien must be reduced by the same percentage of comparative fault found in Superior Court.

3. A.R.S. §23-1023 provides:

"A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.

"B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within on year after trhe[sic] cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insuran[sic] carrier or the person liable for the payment thereof, or may be reassigned in its entirety to the employee or his dependents. After the reassignment, the employee entitled to compensation,/ or his dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

"C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the

> claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. the[sic] insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Comprise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim."

4. The statute specifically provides that "the amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorney fees, actually expended in securing such recovery." The Supreme Court in Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 542 P.2d 1102 (1975) stated that:

> "...There is no provision in A.R.S. §23-1023(C) to deny an employer a lien even if the employer was contributorily negligent. The right of an employer, or its workmen's

> compensation carrier, to enforce its lein[sic] under A.R.S. §23-1023(C) against any judgment recovered by an employee in a third party action is not dependent on the employer's freedom from concurrent negligence contributing to the injury and the third party cannot assert such negligence as a defense or ask for indemnification from said employer or his carrier."

More recently the Court of Appeals in Boy v. Fremont Idem. Co., 154 Ariz. 334, 742 P.2d 835 (1987) reiterated that the insurer "shall have a lien on the amount actually collectable." The Court then went on to comment:

> "...We interpret the sttute[sic] to mean what it plainly says. Arizona courts have consistently resisted efforts to limit the insurer's lien."

5. In addition, to reduce the carrier's lien in proportion to the 25% comparative fault would be interjecting the concept of fault. It has long been recognized that in the state of Arizona, workers' compensation procedure is a no fault process and such doctrine has been eliminated in the employment setting, see Colvert v. Industrial Commission, 21 Ariz.App. 409, 520 P.2d 322 (1974).

6. A.R.S. §12-2506 which is part of the comparative negligence scheme and which specifically dealt with abolishing joint and several liability states in part:

> "Assessments of percentages of fault for non-parties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against non-parties does not subject any non-party to liability in this or any other action, and it may not be introduced as evidence of liability in any action."

Again, it can be presumed that the statute means what it plainly says.

7. In the instant case the carrier's lien cannot be reduced by the Superior Court finding of 25% comparative fault. Having so concluded there is no reason to further discuss issues 1, 3, 5, 6 and 7 set forth in the stipulation of the parties filed with the Industrial Commission on March 25, 1991.

8. As to the second issue set forth in the stipulation of March 25, 1991 it appears that the parties have agreed that $45,580.00 is not subject to nor should it e made a part of the lien.

9. The last issue which remains to be resolved is whether the workers' compensation lien attaches to a judgement for loss of consortium. This issue has been discussed, albeit, under joint and several liability legislation in Mannel v. Industrial Commission, 142 Ariz. 153, 688 P.2d 1045 (1984). The Court concluded that the compensation carrier receives "a lien in the amount actually collectable from the (third party tort feasor) to the extent of the carrier's obligation for compensation benefits." The Court stated:

> "If a lien is allowed, it applies to the entire third-party recovery (less expenses and attorneys fees), even though this recovery icludes[sic] damages not compensated under workers' compensation (such as pain and suffering, loss of pleasures in life, and a spouses's loss of consortium)."

10. The workers' compensation carrier's lien attaches to the loss of consortium claim to the applicant's husband. While this proposition should maybe revisited in light of the changes in the law it is not the prerogative of the undersigned to take such a course of action.

AWARD

IT IS HEREBY ORDERED that the worker's compensation carrier's lien shall not be reduced by the Superior Court finding the non-party employer 25% comparative negligent.

IT IS FURTHER ORDERED that Four Thousand Five Hundred Eighty and 65/100 Dollars ($4,580.65) is not subject to the lien nor is it a part thereof.

IT IS FURTHER ORDERED that the workers' compensation carrier's lien attaches to the loss of consortium judgment in favor of the applicant's husband.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of the Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided for by Arizona Revised Statutes, Secs. 23-942 D and 23-943 A and B.

Unless such written request is made within the time provided, this Award is final.

By_____
JERRY C.
SCHMIDT
Administrative Law
Judge

JCS:bes
DATED AND MAILED IN TUCSON, ARIZONA THIS 8TH DAY OF MAY 1991.

APPENDIX E

Supreme Court
State of Arizona
402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone (602) 542-9396
Noel K. Dessaint
Kathleen E. Kempley
Clerk of Court
Chief Deputy Clerk

December 21, 1995

RE: FAITH AITKEN vs. INDUSTRIAL COMM OF AZ/AMPHITHEATER PUBLIC SCHOOLS et al
Supreme Court No. CV-92-0257-PR
Court of Appeals No. 2 CA-IC 91-0042
Industrial Commission No. 374-78-9448 / Carrier No. A065140

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 19, 1995, in regard to the above-referenced cause:

ORDERED: Motion for Leave to Join in Support of Motion for Reconsideration as Amicus and to File Amicus Brief = GRANTED. The Clerk shall file the Amicus Brief.

FURTHER ORDERED: Motion for Reconsideration = DENIED.

Mandate to follow.

NOEL K. DESSAINT, Clerk

TO: [All counsel]

APPENDIX F

SUPREME COURT OF ARIZONA

FAITH AITKEN,

Petitioner Employee,

v.

INDUSTRIAL COMMISSION OF ARIZONA

Respondent,

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

Supreme Court No. CV-92-0257-PR

Court of Appeals No. 2 CA-IC 91-0042

Industrial Commission No. 374-78-9448

Carrier No. A056140

M A N D A T E

TO: Industrial Commission of Arizona, in relation to Claim No. 374-78-9448

The above entitled and numbered cause was brought before Division Two of the Court of Appeals, No. 2 CA-IC 91-0042, for review by special action. That Court filed its Opinion on the 14th day of May, 1992. A

Petition for Review was granted by this Court on the 12th day of January, 1993.

This Court, having considered the matter, filed its Opinion of the 17th day of October, 1995, setting aside the award entered in the above entitled cause.

The Opinion of the Court of appeals is vacated; the Commission's award is set aside, and the case is remanded to the Industrial Commission.

A Motion for Reconsidered was filed and was denied by order of this Court on the 19th day of December, 1995.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be held in this matter as shall be required to comply with the is Court's Opinion (copy attached to this original mandate).

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the Supreme Court of the State of Arizona this 18th day of January, 1996.

NOEL K. DESSAINT, Clerk
TO: [All Counsel]

APPENDIX G

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Amendments to the United States Constitution

1. FIFTH AMENDMENT.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. FOURTEENTH AMENDMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State

shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes

3. 28 U.S.C. § 1257

§ 1257. (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by write of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the terms "highest court of a State" includes the District of Columbia Court of Appeals.

4. 28 U.S.C. § 2403(b)

§ 2403(b): In any action, suit, or proceeding in a court

of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Arizona Statutes

5. Ariz.Rev.Stat.Ann. § 12-2506 (prior to 1993 amendments, and in effect when the Administrative Law Judge issued his Findings and Award on May 8, 1991, and his Decision upon Review Affirming the Award, on August 6, 1991, and when the Arizona Court of Appeals issued its opinion in Aitken v. Industrial Commission on May 14, 1992)

§ 12-2506. Joint and several liability abolished; exceptions; apportionment of degrees of fault; definitions

A. In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be

entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.

B. In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit. Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault. Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action.

C. The relative degree of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact. If two or more claimants have independent claims, a separate determination and apportionment of the relative degrees of fault of the respective parties, and any nonparties at fault, shall be made with respect to each of the independent claims.

D. The liability of each defendant is several only and is not joint, except that:

1. A party is responsible for the fault of another person, or for payment of the proportionate share of another party, if both parties were acting in concert or if a person was acting as an agent or servant of the party.

2. Nothing in this section prohibits the imposition of joint and several liability in a cause of action relating to hazardous wastes or substances or solid waste disposal sites.

E. If a defendant is found jointly and severally liable pursuant to subsection D, the defendant has the right to contribution pursuant to this chapter.

F. As used in this section:

1. "Acting in concert" means pursuing a common plan or design to commit a tortious act and actively taking part in it.

2. "Fault" means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.

6. Ariz.Rev.Stat.Ann. § 12-2506 (with 1995 amendments, in effect when Supreme Court of Arizona issued its opinion in Aitken v. Industrial Commission on October 17, 1995.)

§ 12-2506. Joint and several liability abolished; exceptions; apportionment of degrees of fault; definitions

A. In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.

B. In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit. Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault. Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action.

C. The relative degree of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact. If two or more claimants have independent claims, a separate determination and apportionment of the relative degrees of fault of the respective parties, and any nonparties at fault, shall be made with respect to each of the independent claims.

D. The liability of each defendant is several only and is not joint, except that:

1. A party is responsible for the fault of another person, or for payment of the proportionate share of another person, if both the party and the other person were acting in concert or if the other person was acting as an agent or servant of the party.

2. Nothing in this section prohibits the imposition of joint and several liability in a cause of action relating to hazardous wastes or substances or solid waste disposal sites.

E. If a defendant is found jointly and severally liable pursuant to subsection D, the defendant has the right to contribution pursuant to this chapter.

F. As used in this section:

1. "Acting in concert" means entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort. Acting in concert does not apply to any person whose conduct was negligent in any of its degrees rather than intentional. A person's conduct which

provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.

2. "Fault" means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.

7. Ariz. Rev. Stat. Ann. § 23-1023

§ 23-1023. Liability of third person to injured employee; election of remedies

A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.

B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for the payment thereof, or may be reassigned in its entirety to the employee or his

dependents. After the reassignment, the employee entitled to compensation, or his dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim.

8. Rule 22, 17B, Ariz.Rev.Stat.Ann, Arizona Rules of Civil Appellate Procedure (including historical notes)

ARIZONA REVISED STATUTES ANNOTATED

RULES OF CIVIL APPELLATE PROCEDURE

Current with Amendments received through August 1, 1995

Rule 22. Motion For Reconsideration

(a) Necessity. The filing of a motion for reconsideration in the Court of Appeals is not a prerequisite to the filing of a petition for review pursuant to Rule 23.

(b) Time for Filing; Response. Any party desiring reconsideration of a decision of an appellate court may file a motion for reconsideration in the appellate court within fifteen days after the filing of a decision by the appellate court. The motion shall not be amended except by leave of court.

No response to a motion for reconsideration will be filed unless requested by the Court, but a motion for reconsideration will not be granted in the absence of such a request.

(c) Contents. A motion for reconsideration shall be directed solely to discussion of those specific points or

matters in which it is claimed the appellate court erred in determination of facts or law. Neither the motion for reconsideration nor the response shall exceed fifteen pages.

(d) Motions Not Permitted. Unless permitted by specific order of the appellate court, no party shall file a motion for reconsideration of (1) an order denying a motion for reconsideration; (2) an order denying a petition for review; or (3) an order declining to accept jurisdiction of a petition for special action.

CREDIT(S)

1988 Main Volume

Amended April 28, 1983, effective Sept. 1, 1983.

1995 Pocket Part

Amended June 24, 1993, effective Dec. 1, 1993; Feb. 24, 1994, effective June 1, 1994.

HISTORICAL NOTES

COMMENT TO 1993 AMENDMENT

1995 Pocket Part

The purpose of the 1993 amendment to Rule 22(b), which precluded responses to motions for reconsideration except upon request by the court, was to avoid the significant and in most cases unnecessary legal expense incurred in connection with motions for

reconsideration. A parallel change was made in Rule 31.18(b), Rules of Criminal Procedure.

COMMENT

1988 Main Volume

The 1983 amendments to Rules 22 and 23 change the procedures for post-decision review in the Court of Appeals and the Supreme Court. Motions for rehearing are eliminated. They are replaced by much more limited motions for reconsideration which are in order only when an opinion should be changed because of an error of fact or law. Such errors are intended to be narrowly defined. Parties filing motions for reconsideration should be able to point to specific misstatements of fact or statutory or decisional law.

Disagreements with opinions of the Court of Appeals based upon questions of policy, analysis and interpretation should be presented to the Supreme Court by petition for review. As stated in Rule 22(a), filing of a motion for reconsideration is not required before a party petitions for review in the Supreme Court.

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

No. 95-1484

In The

Supreme Court of the United States

October Term, 1995

AMPHITHEATER PUBLIC SCHOOLS and UNIGARD INSURANCE COMPANY,

Petitioners,

vs.

FAITH AITKEN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

RESPONDENT'S BRIEF IN OPPOSITION

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49 pp

QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257 to review a state court decision where the state court did not decide a federal question and where no federal question was seasonably presented in the state court?

2. If this Court has jurisdiction, should this Court exercise its discretion to grant a Writ of Certiorari where the criteria of Supreme Court Rule 10 have not been met, where the state court has not decided a federal question, and where the record below has not been adequately developed to address Petitioners' untimely raised federal questions?

3. Is the Due Process Clause of the Fourteenth Amendment violated where an insurance company and its insured, which have full actual notice of a legal action, fail to participate and be heard in the action and where the action merely affects their erroneous "unilateral expectancies" rather than their actual then-existing "property" rights?

LIST OF INTERESTED PARTIES

Petitioners are Unigard Insurance Company and Amphitheater School District.

Respondent is Faith Aitken. Gerald T. Barton is counsel of record for Respondent Faith Aitken. Robert Q. Hoyt also represents Faith Aitken.

No federal questions were raised, decided, "drawn in question" or "passed on" regarding the federal constitutionality of any Arizona statute. This Court, therefore, should not permit the State of Arizona to intervene for presentation of evidence or argument in this case.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statement of the Case	2
Reasons for Denying the Writ	7
I. This Court Lacks Jurisdiction to Consider the Petition.	7
A. The Arizona Supreme Court Decided this Case on an Adequate, Independent State Ground. No Federal Issue Was Decided Below.	7
B. Petitioners Did Not Raise a Federal Question Below.	8
C. Petitioners Have Failed to Establish a Basis for this Court's Jurisdiction.	9
II. This Court Should Not Exercise its Discretion to Review this Case Because the Criteria of Rule 10 Are Not Met, Because No Arizona Court Decided	

Contents

Page

a Federal Question, and Because Sound Reasons, Including an Insufficient Record Below, Militate Against Review. 12

III. Petitioners' Due Process Rights Were Not Violated. 14

A. Petitioners Had Actual Notice of the Third-Party Action and an Opportunity to Participate and Protect Their Interests. 16

B. Petitioners Were Not "Deprived" of "Property" Protected by the Due Process Clause. 19

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

American Surety v. Baldwin, 287 U.S. 156 (1932) 8, 9

Anderson National Bank v. Luckett, 321 U.S. 233 (1944) 17

Banker's Life and Casualty Company v. Crenshaw, 486 U.S. 71 (1988) 10, 11

Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 8, 9

Contents

	Page
Board of Regents v. Roth, 408 U.S. 564 (1972)	19, 20
Cardinale v. Louisiana, 394 U.S. 437 (1969)	13
Chevron Chemical Company v. Superior Court, 131 Ariz. 431, 641 P.2d 1275 (1982)	17
Coleman v. Thompson, 501 U.S. 722 (1991), *reh. denied*, 501 U.S. 1277	8
Dietz v. General Electric, 169 Ariz. 504, 821 P.2d 166 (1991)	4, 9
Emblen v. Lincoln Land Company, 184 U.S. 660 (1902)	20
Fuentes v. Shevin, 407 U.S. 67 (1972)	17, 18
Grijalva v. Arizona State Compensation Fund, __Ariz.__, __P.2d__, 212 Ariz. Adv. Rep. 33 (Supreme Court No. CV-93-0329-PR, decided March 9, 1996)	14
Hanson v. Denckla, 357 U.S. 235 (1958)	8
Harris v. Reed, 485 U.S. 255 (1989)	10
Hathorn v. Lovorn, 457 U.S. 255 (1982)	10, 11
Heath v. Alabama, 474 U.S. 82 (1985)	12
Herndon v. Georgia, 295 U.S. 441 (1935)	8, 9

Contents

	Page
Illinois v. Gates, 462 U.S. 213 (1983)	7, 13
Jiminez v. Sears, Roebuck & Co., 183 Ariz. 399, 904 P.2d 861 (1995)	11
Johnson v. Radio Station WOW, 326 U.S. 120 (1944)	8
Logan v. Zimmermann Brush Company, 455 U.S. 422 (1982)	18, 19
Martinez v. California, 444 U.S. 277 (1980)	19
Michigan v. Long, 463 U.S. 1032 (1983)	10
Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983)	19
Sperry and Hutchinson v. Rhodes, 220 U.S. 502 (1911)	20
State ex rel. Industrial Commission v. Pressley, 74 Ariz. 412, 250 P.2d 992 (1952)	17
State ex rel. Industrial Commission v. Reese, 74 Ariz. 425, 250 P.2d 1001 (1952)	17
Street v. New York, 394 U.S. 576 (1969)	7, 8, 9
Tracy v. Ginzberg, 205 U.S. 170 (1907)	21
United Pacific/Reliance Insurance v. Kelley, 127 Ariz. 87, 618 P.2d 257 (App. 1980)	17

Contents

Page

Webb v. Webb, 451 U.S. 493 (1981) 7, 8, 13

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 20

Weinco, Inc. v. Katahn Associates Inc., 965 F.2d 565 (7th Cir. 1992) 18

Yee v. City of Escondido, 503 U.S. 519 (1992) 8

Statutes Cited:

A.R.S. § 12-2506 ..... 4, 15, 19, 20, 21

A.R.S. § 23-1023 ..... 3, 4, 13, 15, 16, 20, 21

28 U.S.C. § 1257 ..... i, 1, 7

United States Constitution Cited:

Fifth Amendment 6, 10, 11

Fourteenth Amendment ..... i, 6, 10

Rules Cited:

Arizona Rule of Civil Appellate Procedure 22 ..... 6, 9, 11

Supreme Court Rule 10 ..... i, 12

Supreme Court Rule 14(1)(g)(i) 14

Contents

Page

APPENDIX

Appendix A — Portions of Transcript of Hearing Before Industrial Commission of Arizona on May 18, 1989 (Pages 1-2, 45-47) 1a

Appendix B — Respondent Faith Aitken's Notice Regarding Third-Party Action, Dated November 22, 1989, and Filed in the Industrial Commission of Arizona November 29, 1989 ..... 6a

Appendix C — Respondent Faith Aitken's Opening Brief in the Arizona Court of Appeals, Dated December 16, 1991, Statement of Issues Presented, Page 4 ..... 7a

Appendix D — Petitioners Amphitheater and Unigard's Answering Brief in the Arizona Court of Appeals, Dated March 14, 1992, Statement of Issues Presented for Review, Page 1 ..... 11a

Appendix E — Petitioners Amphitheater and Unigard's Response to Petition for Review in the Supreme Court of Arizona, Dated July 15, 1992, Statement of Issues Presented for Review, Page 2 ..... 14a

Appendix F — Order of Supreme Court of Arizona Granting Review on Issues 1 and 2 Only and Setting Case for Oral Argument Dated January 13, 1992 .... 17a

Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Supreme Court of Arizona. That opinion is reported at 183 Ariz. 387, 904 P.2d 456 (1995), *vacating* 173 Ariz. 300, 842 P.2d 1313, *petition for cert. filed*, __ U.S.L.W. __ (U.S. March 15, 1996) (No. 95-1484).

The opinion of the Arizona Court of Appeals was filed May 14, 1992, and is reported at 173 Ariz. 300, 842 P.2d 1313, *vacated* at 183 Ariz. 387, 904 P.2d 456 (1995).

The Findings and Award of the Administrative Law Judge of the Industrial Commission of Arizona were issued on May 8, 1991, and were affirmed by that Judge on August 6, 1991. The Findings and Award are unreported.

The Appendix to the Petition for Writ of Certiorari includes the text of the Supreme Court of Arizona's opinion ("Appendix A"), the Arizona Court of Appeal's opinion ("Appendix B"), the Findings and Award of the Administrative Law Judge ("Appendix D"), and the Administrative Law Judge's Order affirming his own findings ("Appendix C"). For the convenience of the Court, pertinent portions of these opinions shall be referred to by the page number in Petitioner's Appendix (referred to as "Pet. App. p. __.").

STATEMENT OF JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257. No Arizona appellate court described, discussed or decided a federal issue. The questions presented for review in the Petition were never timely raised in the Arizona courts. Even if the Court determines that it has jurisdiction, this Court should not exercise that jurisdiction. (*See* pp. 7-14, *infra.*)

STATEMENT OF THE CASE

Petitioners' Statement of the Case is materially incomplete. Therefore, Respondent presents her own Statement of the Case.

Respondent Faith Aitken was employed as a custodian by Petitioner Amphitheater School District, which was insured for worker's compensation by Petitioner Unigard Insurance Company. Respondent was very seriously injured in a workplace accident on May 18, 1988. The next day, Respondent filed a worker's compensation claim form which indicated that a third party construction company had contributed to the injury. Under Arizona law, Respondent's employment status precluded her from suing her employer, but permitted her to maintain a separate action ("the third-party action") against the construction company, Maya Construction.

Respondent received benefits pursuant to her worker's compensation claim. Respondent also filed a third-party action against Maya Construction. The worker's compensation claim in the Industrial Commission of Arizona and the third-party claim in Arizona state court proceeded simultaneously. During the worker's compensation proceedings, Respondent's continued eligibility for worker's compensation benefits was contested. At a hearing on May 18, 1989, before the Industrial Commission, a treating psychologist for Respondent testified regarding Respondent's continuing injury. On cross-examination, counsel for the insurance carrier (who is also counsel of record for the same Petitioners before this Court) questioned the treating psychologist regarding the third-party action and whether it evidenced a motive of "secondary gain" on Respondent's part. (*See* Appendix A, Transcript of ICA Hearing, at 1a-5a.) Counsel's questions reveal that both Petitioners in fact knew of the third-party action approximately 11 months before the third-party case was actually tried. On November 29, 1989,

Respondent filed in the Industrial Commission of Arizona a formal notice of her third-party claim against Maya. That filing gave Petitioners further formal notice of the third-party action. (*See* Appendix B, Notice of Third-Party Action, at 6a.) Although Petitioners had both actual and formal legal notice of the third-party action, Petitioners did not participate in that action to protect their interests.

The third-party action against Maya Construction was tried in April, 1990. (The case was tried under comparative fault/several liability law, a statutory scheme which became effective in Arizona in 1988.) The jury returned a verdict and judgment was entered, as described in the Petition. The jury assessed total damages of $319,292 and apportioned fault among Maya Construction (65%), Respondent's employer (25%), and Respondent herself (10%). As a result of the apportionment of fault, Respondent recovered only 65% ($297,350) of her total damages. Respondent did *not* recover an additional $79,823 in damages because her actual recovery was reduced for the 25% fault attributable to her employer, Petitioner Amphitheater.

Despite the damage reduction of $79,823, Respondent, pursuant to A.R.S. § 23-1023, reimbursed Petitioner Unigard Insurance, her employer's worker's compensation carrier, the full amount of worker's compensation benefits which it had paid ($28,929.70). Respondent, however, contested the amount of that repayment and any future credit as erroneous and violative of Respondent's state constitutional rights. The question of the proper amount of reimbursement and future credit was presented to the Industrial Commission which determined that Petitioners were entitled to full reimbursement. Respondent then appealed to the Arizona Court of Appeals.

While the appeal was pending before the Arizona Court of Appeals and before any briefs were filed, the Supreme Court of

Arizona on November 21, 1991, decided *Dietz v. General Electric*, 169 Ariz. 504, 821 P.2d 166 (1991). *Dietz* determined that under Arizona's comparative negligence/several liability statute (A.R.S. § 12-2506), it was permissible for a third party (like Maya Construction) to name an employer (like Amphitheater School District) as a non-party at fault to which the jury could attribute fault, thereby reducing an injured worker's recoverable damages. *Dietz* recognized that in such a case an inequity would result if the injured worker (like Respondent) were required under A.R.S. § 23-1023 to repay the full amount of the worker's compensation benefits. *Dietz* clearly suggested that the solution to this inequity lay in the reduction of the payback to the worker's compensation carrier. When *Dietz* was decided, the parties immediately stipulated on November 22, 1995, to extend the time for filing briefs in the Court of Appeals. The stipulation expressly recognized that the *Dietz* decision "will have a direct impact on the arguments presented in this case."

Respondent filed her Opening Brief in the Arizona Court of Appeals on December 16, 1991. Respondent requested that the Court of Appeals grant exactly the relief which had been described in *Dietz*: namely, that there be a right of reimbursement to a worker's compensation carrier only to the extent that it had paid worker's compensation benefits in excess of the damage reduction for fault attributable to an employer. (*See* Appendix C, Respondent's Opening Brief in Arizona Court of Appeals, "Issues Presented", at pp. 7a-10a.) Petitioners filed their Answering Brief on February 14, 1992. The Answering Brief "acquiesced in (Respondent's) statement of the issues on appeal". It raised no issue of violation of federal constitutional rights if the court followed the *Dietz* principle. (*See* Appendix D, Petitioners' Answering Brief in Arizona Court of Appeals, p. 1, "Issues Presented for Review", at pp. 11a-13a.) The Court of Appeals ruled for Petitioners. Its opinion neither addressed nor

decided any issue arising under the United States Constitution. (*See* Pet. App. pp. A-17 to A-25.)

On June 15, 1992, Respondent filed a Petition for Review to the Supreme Court of Arizona. Petitioners responded on July 15, 1992. The response raised no federal constitutional arguments. (*See* Appendix E, Petitioners' Response to Petition for Review, at pp. 14a-16a.) The Arizona Supreme Court granted review on January 13, 1993. The order granting review specifically identified the issues which the Supreme Court of Arizona would consider. No federal issues were identified. (*See* Appendix F, Order granting review, at pp. 17a-18a.) Two Amici, the Southern Arizona Worker's Compensation Claimants' Attorneys Association and the Arizona Trial Lawyer's Association, subsequently filed Amicus briefs. Petitioners responded to those briefs but raised no federal constitutional issues. Before the Arizona Supreme Court issued its opinion, Petitioners never filed a request that the Supreme Court of Arizona hear argument, permit supplemental briefing, or in any way entertain or consider federal constitutional issues. The court heard oral argument on June 2, 1993.

On October 17, 1995, the Supreme Court of Arizona issued its opinion in *Aitken* (Pet. App., pp. A-1 - A-16.) As pertinent to this Petition for Certiorari, the *Aitken* opinion establishes:

1. That the Supreme Court of Arizona decided *Aitken* purely on the basis of Arizona state law. (Pet. App., pp. A-1 - A-16.)

2. That the court applied rules of statutory construction and interpreted Arizona statutes in a manner which avoided a decision regarding Arizona *state* constitutional issues. (Pet. App., pp. A-5 - A-6.)

3. That the court did not describe, discuss or decide any *federal* issues. (Pet. App., pp. A-1 - A-16.)

4. That the court specifically discussed its 1991 decision in *Dietz v. General Electric*, 169 Ariz. 504, 821 P.2d 166 (1991), analyzing the facts and law in precisely the manner which *Dietz* had foreshadowed, citing the same authorities, and reaching the same result which had been anticipated four years earlier in *Dietz*. (Pet. App., pp. A-6 - A-10.)

The Supreme Court of Arizona ruled for Respondent, vacated the Court of Appeals decision and remanded the case to the Industrial Commission of Arizona.

On October 31, 1995, Petitioners filed a Motion for Reconsideration pursuant to Rule 22, Arizona Rules of Civil Appellate Procedure, which permits reconsideration only in narrowly defined instances where the opinion of the appellate court should be changed because of an error of fact or law. ARCAP, Rule 22 and Co. ments (*See* Pet. App., pp. A-50 - A-52.) Despite Rule 22's express limitation, the Motion for Reconsideration raised federal constitutional issues for the first time. The motion contended that the *Aitken* decision violated Petitioners' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. On November 17, 1995, Petitioners supplemented their motion to add a claim of violation of the "takings clause" of the Fifth Amendment. Respondent answered, specifically arguing, among other things, that Rule 22 precluded the newly raised federal constitutional claims which had never previously been raised or decided. The Supreme Court of Arizona denied the Motion for Reconsideration without opinion on December 19, 1995.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITION.

28 U.S.C. § 1257 describes the jurisdiction of the Supreme Court of the United States to review state court judgments. That section limits this Court's review to cases where a federal right is "drawn in question." This Court may review cases only when a federal question was raised and necessarily decided. *Street v. New York*, 394 U.S. 576, 581-82 (1969).[1]

A. The Arizona Supreme Court Decided this Case on an Adequate, Independent State Ground. No Federal Issue Was Decided Below.

The Supreme Court of Arizona decided this case on the basis of statutory construction of two Arizona statutes. The case presented purely state questions. The court's opinion refers to no federal questions. The Supreme Court of Arizona not only did not decide federal constitutional questions, but it also expressly avoided addressing even *state* constitutional issues. (Pet. App., pp. A-5 - A-6.) This Court need only look to the language of the opinion to determine that no federal question was decided. *See Illinois v. Gates*, 462 U.S. 213, 220-221 (1983); *Webb v. Webb*, 451 U.S. 493, 495 (1981). Since the Supreme Court of Arizona did not decide a federal question and since its decision rests on independent and adequate state grounds, this Court lacks

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1. Respondent submits that 28 U.S.C. § 1257 is a limitation on this Court's jurisdiction. This Court has discussed, but not decided, whether limitations on its review of state court decisions is "jurisdictional" or merely "prudential." *See e.g., Illinois v. Gates*, 462 U.S. 213, 218-222 (1983). In either event, the result is the same: this Court should not consider this case.

jurisdiction. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *reh. denied*, 501 U.S. 1277.

B. Petitioners Did Not Raise a Federal Question Below.

Petitioners raised no federal constitutional question until they filed their Motion for Reconsideration *after* the Supreme Court of Arizona had issued its opinion. In *Herndon v. Georgia*, this Court stated:

> The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.

295 U.S. 441, 443 (1935).

Here, the Supreme Court of Arizona did *not* decide any federal question. This Court has consistently held under facts identical to the present case — where the highest state court issues its opinion, where a party then files a motion for rehearing raising federal constitutional issues for the first time, and where the state court denies the motion without opinion — that the constitutional issues have not been timely or seasonably raised below and cannot be considered by this Court. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Hanson v. Denckla*, 357 U.S. 235, 243 (1958); *Johnson v. Radio Station WOW*, 326 U.S. 120, 128-29 (1944); *American Surety v. Baldwin*, 287 U.S. 156, 162-63 (1932). Where no federal question is raised below, this Court lacks jurisdiction to consider the question. *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987); *Webb v. Webb*, 451 U.S. 493, 495 (1981); and *Street v.*

New York, 394 U.S. 576, 581-82 (1969).[2]

Petitioners, however, seem to argue that the Supreme Court of Arizona's failure to address constitutional issues raised by their Motion for Reconsideration somehow constituted an "implicit" adverse ruling on the federal claim. Petitioners are wrong. The Arizona court's silence on the late-raised constitutional issues is presumed to result from a deficiency in Petitioners' presentation of those issues to the Arizona courts. *Board of Directors of Rotary International*, *supra*, 481 U.S. at 550; *Webb*, *supra*, 451 U.S. at 495; *Street*, *supra*, 394 U.S. at 582. Here, Petitioners failed to raise any federal constitutional issue until they filed their Motion for Reconsideration, which, under Rule 22, Arizona Rules of Civil Appellate Procedure, prohibited new and different issues (such as federal constitutional issues) from being raised for the first time. For these reasons, this Court lacks jurisdiction to review this case.

C. Petitioners Have Failed to Establish a Basis for this Court's Jurisdiction.

Petitioners argue that their post-opinion Motion for Reconsideration sufficiently raised federal constitutional issues and that the Supreme Court of Arizona's denial of that motion

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2. An exception to this rule exists where the state court decision construes a statute in an unanticipated way which results in a constitutional violation. *Herndon*, *supra*, 295 U.S. at 441; *American Surety*, *supra*, 287 U.S. at 164. The exception does not apply in this case because the Supreme Court of Arizona's opinion in *Dietz v. General Electric*, 169 Ariz. 504, 821 P.2d 166 (1991), not only anticipated *Aitken's* holding, but also contained the same analysis and cited the same authorities. Therefore, Petitioners were required to raise their federal constitutional issues *before* the Supreme Court of Arizona decided *Aitken*. See *Herndon*, 295 U.S. at 445-46 (where prior decision includes same ruling, similar ruling must be anticipated and party must raise issue before rehearing). The *Aitken* opinion itself recognizes how *Dietz* anticipated the *Aitken* decision. (*See* Pet. App., pp. A-6 - A-10.)

without opinion somehow constituted a decision on the merits of the federal claim. Petitioners are wrong on both counts. First, Petitioners rely on *Harris v. Reed*, 485 U.S. 255 (1989) and *Michigan v. Long*, 463 U.S. 1032 (1983) for the proposition that an adequate and independent state ground of decision is present only if the state court made a "plain statement" that its decision was based on state grounds. This "plain statement rule" arises, however, only in cases where the state court has decided *both* state and federal questions, thereby requiring a "plain statement" from the state court to explain the basis for its decision. In this case, the Supreme Court of Arizona decided only state law questions. No federal issue was described, discussed or decided. Therefore, the "plain statement rule" does not apply.

Secondly, Petitioners wrongly rely on *Banker's Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988) and *Hathorn v. Lovorn*, 457 U.S. 255 (1982), for the proposition that federal questions raised for the first time in a post-opinion motion are timely and sufficient so long as they identify a specific constitutional provision at issue. In *Hathorn*, however, it appears that the state court had actually addressed a federal question below. 457 U.S. at 261. The Supreme Court of Arizona's opinion, in contrast, was premised purely on state statutory law and avoided even *state* constitutional questions. Further, Petitioners' Motion for Reconsideration did not meet the "specificity requirements" of *Banker's Life*. Petitioners' original Motion for Reconsideration referred only to a taking "without due process, violating (Petitioners') rights under the Fifth and Fourteenth Amendments to the Constitution of the United States." Their Supplement to that Motion advanced the "takings clause" of the Fifth Amendment. Petitioners' Motion for Reconsideration below and their Petition for Writ of Certiorari in this Court refer to cases which involve "takings" by the United States Government, substantive due process, and procedural due process. Those cases and theories are "thrown

together" without a clear articulation of the constitutional clauses which were violated or the manner in which such violation occurred in this case. Even at the time of responding to this Petition, it is unclear whether Petitioners contend solely that procedural due process was violated, or also that substantive due process and the Fifth Amendment "takings clause" as incorporated through the Fourteenth Amendment were violated, or that all of those constitutional violations occurred. *Banker's Life* requires specificity and clarity in the articulation of constitutional claims. 486 U.S. at 77-80. Petitioners do not satisfy *Banker's Life* standards.

Thirdly, Petitioners rely on *Banker's Life* and *Hathorn* to argue that an inconsistently applied procedural rule cannot form the basis for denial of federal constitutional rights. But the Supreme Court of Arizona has consistently followed Rule 22, Arizona Rules of Civil Appellate Procedure, to *not* consider *new* issues raised in a motion for reconsideration after an opinion has issued. Petitioners have cited no Arizona decision (and indeed no such authority exists) where the Supreme Court of Arizona considered such late raised issues or modified an opinion based on such issues. Unlike the state courts in *Banker's Life* and *Hathorn*, Arizona courts have consistently refused to consider *all* new post-opinion issues, including federal constitutional issues. *See Jiminez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 396-97, 904 P.2d 861, 868-69, n.9 (1995) (new issues on appeal permitted only as "rare exception"; *no* Arizona authority cited for considering new issue raised for first time *after* opinion issued.)

Finally, the only facts in the record below establish that Petitioners had actual notice of the third-party action and attempted to reduce Respondent's worker's compensation recovery by attacking her credibility because she had filed the third-party action. The undisputed law in Arizona is that

Petitioners could have intervened in the third-party action to protect their interests. The *uncontested* facts and law below establish that Petitioners had both notice of the third-party action and an opportunity to be heard. (*See* pp. 16-19, *infra.*) Instead of intervening in the third-party action, however, Petitioners did nothing. Thus, to the extent that Petitioners' constitutional claim advances a procedural due process theory, it must be rejected on a jurisdictional basis. This Court should not engage in speculation when *no* facts in the record below support Petitioners' constitutional argument.

II.

THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THIS CASE BECAUSE THE CRITERIA OF RULE 10 ARE NOT MET, BECAUSE NO ARIZONA COURT DECIDED A FEDERAL QUESTION, AND BECAUSE SOUND REASONS, INCLUDING AN INSUFFICIENT RECORD BELOW, MILITATE AGAINST REVIEW.

Rule 10, Rules of the Supreme Court, provides that review on a writ of certiorari is a matter of "judicial discretion" and will be granted "only for the most compelling reasons." The present Petition meets none of the Rule's suggested criteria for granting review. No Arizona appellate court "decided an important federal question." The *Aitken* decision does not conflict with decisions of this Court, federal courts or other state courts. Rather, *Aitken* simply applied Arizona law to interpret two Arizona statutes. There is "a weighty presumption against review" where federal claims were not raised or passed on in state court. *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

Furthermore, sound reasons support the rule that review should not be granted unless federal questions were timely

presented below and actually decided by the state court: the record below should be adequately developed; state courts should be afforded the first opportunity to address federal issues; principles of comity require deference to state court decisions; state courts may decide cases based on adequate independent state grounds which do not require analysis of federal issues; this Court's workload should not be unnecessarily expanded. *Illinois v. Gates*, 462 U.S. 213, 221 (1983); *Webb v. Webb*, 451 U.S. 493, 499-501 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Each reason favors denial of the writ in this case. The record below was only scantily developed regarding federal issues. They were never fully briefed or argued. They are not addressed or decided in the opinion. If federal issues had been timely presented, Arizona courts might have addressed the state constitutional issues which they did not reach in *Aitken*. The only facts in the record below establish that Petitioners had both actual and formal notice of the third-party action and could have been heard in that action. Petitioners presented no countering facts. The scant record below suggests no genuine present federal issue. Further, the Supreme Court of Arizona decided this case purely on adequate state grounds; Petitioners' failure to raise timely federal issues precluded Arizona courts from fully addressing and deciding the federal claims now set forth in the Petition. This Court need not take on a case where the record is undeveloped and no federal issues are implicated.

Petitioners contend that certiorari should be granted because *Aitken* will have broad-ranging, deleterious effects in other pending cases. For example, Petitioners complain: "In trials to the court, judges can attribute as much fault to the employer as they desire in attempts to protect the worker's recovery from the lien (of A.R.S. § 23-1023)." (Petition, p. 16.) The Supreme Court of Arizona dispelled such concerns in its

recent decision in *Grijalva v. Arizona State Compensation Fund*, __ Ariz. __, __ P.2d __, 212 Ariz.Adv.Rep. 33 (Supreme Court No. CV-93-0329-PR, decided March 19, 1996). There, the court refused to extend *Aitken* to a "summary court trial" where the judge entered an order which served the sole purpose of defeating the carrier's right of reimbursement pursuant to a "contrived" settlement. The court distinguished *Aitken* which involved "a contested third party trial that necessitated a (jury's) determination of liability and damages, including the apportionment of fault among parties and non-parties as required by law." *Id.* As *Grijalva* shows, the appellate courts of Arizona can adequately control the scope and effect of their own decisions.

Finally, Rule 14 (1)(g)(i), Rules of the Supreme Court, requires a statement of the case which establishes when and how federal issues were raised below both in the first instance and in Arizona's appellate courts. It also requires a statement of "the way in which they were passed on by those courts." Here, no federal issue was raised until the *Aitken* opinion had issued. No Arizona court ever considered, decided or "passed on" a federal issue. For these reasons, this Court should deny the Petition for Writ of Certiorari.

III.

PETITIONERS' DUE PROCESS RIGHTS WERE NOT VIOLATED.

Prior to 1988, joint and several liability law controlled an injured worker's negligence action against a third-party tortfeasor in Arizona. Comparative negligence did not apply. If a jury awarded damages to an injured worker, the worker could recover 100% of her damages from *any* negligent third party (regardless of the fault of other persons who were or were not

parties). If the worker had also recovered worker's compensation benefits, she would then repay to the worker's compensation insurance carrier the amount of benefits received. This payment was made pursuant to A.R.S. § 23-1023.[3]

But in 1988, Arizona abolished joint and several liability and adopted A.R.S. § 12-2506, a comparative negligence/several liability statute under which a jury apportions fault to non-parties-at-fault as well as to parties, and each party at fault pays only that percentage of the total damages which the jury attributes to it. The issue decided in *Aitken* was the effect that Arizona's adoption of comparative negligence/several liability (A.R.S. § 12-2506) had on an insurer's recoupment of worker's compensation benefits previously paid (A.R.S. § 23-1023). The Supreme Court of Arizona decided that the amount and timing of an injured worker's reimbursement obligation to the worker's compensation carrier as described in A.R.S. § 23-1023 was subject to the apportionment of fault as determined by the jury under A.R.S. § 12-2506. The net effect of A.R.S. § 12-2506 was that an injured worker's obligation to repay a worker's compensation carrier arose only to the extent that the amount of worker's compensation benefits actually paid exceeded the amount by which the worker's damages were reduced for her employer's negligence.[4]

---

3. For example, assume an injured worker received $10,000 in worker's compensation benefits. Further assume a jury verdict against a third party in the amount of $50,000. Regardless of the worker's employer's fault, the worker would receive the full $50,000 from the third party and would then repay $10,000 to the worker's compensation carrier.

4. Assume the same facts as above: $10,000 in compensation benefits paid, and $50,000 in total damages; but, further assume that under comparative negligence, the jury apportioned 60% fault to the third party and 40% fault to the non-party employer. Under several liability, the injured worker would recover only $30,000 (*i.e.*, 60% of $50,000) from the third party.

(Cont'd)

Petitioners claim that this ruling deprived them of property without due process because Petitioners were not parties who actually litigated the employer's fault in the third-party action. Petitioners are wrong. First, Petitioners had actual notice of and an opportunity to participate in the third-party action. Secondly, the Supreme Court of Arizona's decision in *Aitken* did not "deprive" Petitioners of any "property" protected by the due process clause.

A. Petitioners Had Actual Notice of the Third-Party Action and an Opportunity to Participate and Protect Their Interests.

Petitioners complain that they were not parties to the third-party action where the jury determined that Respondent's employer was 25% at fault with a consequent $79,823 reduction of Respondent's recoverable damages. But the *only* facts in the record below establish: (1) that Petitioners had actual notice of the third-party suit at least 11 months before the third-party case was tried; (2) that Petitioners affirmatively attempted to use the third-party action to attack Respondent's credibility and thereby reduce her worker's compensation benefits; and (3) Respondent filed a formal notice of the third-party action in the Industrial Commission of Arizona approximately six months before the third-party trial. The *undisputed facts* are that Petitioners had

---

(Cont'd)
Her actual recoverable damages would be reduced by $20,000 (*i.e.*, 40% of $50,000) for fault attributable to her employer. In *Aitken*, the Supreme Court of Arizona decided that a worker's obligation to reimburse a carrier under A.R.S. § 23-1023 existed only when and to the extent that the worker had received compensation benefits in excess of the amount by which her judgment was reduced for an employer's fault. In this hypothetical, for example, there would be no reimbursement to the worker's compensation carrier because the amount of worker's compensation benefits paid ($10,000) did not exceed the amount by which the recoverable damages were reduced ($20,000) for the employer's fault.

both actual and formal legal notice of the third-party action almost one year before it was tried.

Under Arizona law, Petitioners could have intervened in the third-party action to protect their rights. *State ex rel. Industrial Commission v. Reese*, 74 Ariz. 425, 250 P.2d 1001 (1952); *State ex rel. Industrial Commission v. Pressley*, 74 Ariz. 412, 250 P.2d 992 (1952) (worker's compensation carrier may intervene to protect lien and reimbursement rights). Further, the worker's compensation insurance carrier's rights are in the nature of subrogation. *Chevron Chemical Company v. Superior Court*, 131 Ariz. 431, 641 P.2d 1275 (1982). Subrogated insurers have frequently intervened in third-party cases to protect their rights of reimbursement. *E.g., United Pacific/Reliance Insurance v. Kelley*, 127 Ariz. 87, 618 P.2d 257 (App. 1980). Petitioners also knew that comparative negligence/several liability law applied to the third-party claim and that the jury in Respondent's third-party case would apportion fault among parties and non-parties, including Respondent's employer. Petitioners advanced no opposing law below. Petitioners did not intervene below. Therefore, the *undisputed law* in this case is that Petitioners had actual notice and the opportunity to be heard by the jury which attributed fault to the employer in this case.

The fundamental principle of procedural due process is that a person is entitled to notice and an opportunity to be heard before he is deprived of his property. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Anderson National Bank v. Luckett*, 321 U.S. 233, 246 (1944). In the present case, the *undisputed* facts establish that Petitioners had actual notice of the third-party action at least 11 months before it was tried. The *undisputed* law of Arizona is that Petitioners could have participated in the third-party action to protect their interests. Therefore, Petitioners had full, legally binding notice and a meaningful opportunity to be heard. But Petitioners did not avail themselves of that opportunity.

Petitioners did nothing to protect their interests. Due process is not violated where an adverse decision "stems from a party's own failure to avail itself of its opportunity to be heard." *Weinco, Inc. v. Katahn Associates Inc.*, 965 F.2d 565 (7th Cir. 1992).

Petitioners' participation in the third-party lawsuit was not only a sufficient procedure, but was the best procedure under all of the circumstances. In determining the adequacy of a particular procedure, this Court applies a flexible standard which accommodates the competing interests involved, including: (1) the importance of the private interests and the length and finality of the deprivation; (2) the likelihood of governmental error; and (3) the magnitude of governmental interests involved. *Logan v. Zimmermann Brush Company*, 455 U.S. 422, 434 (1982). In light of these factors, due process tolerates variances in the form of the hearing required. *Fuentes, supra*, 407 U.S. at 82.

Applying these considerations to the present case, Petitioners' opportunity to participate in the third-party action where the jury determined the employer's fault was the best, most meaningful procedure available. Regarding the first consideration, Petitioners were not "deprived" of "property" protected by the due process clause. (*See* pp. 19-22, *infra*.) If any "deprivation" occurred, it was not "final" but was merely conditioned on the amount of worker's compensation benefits actually paid. With respect to the second factor, the third-party action where the jury apportioned fault was least likely to cause governmental error. The jury system is long-established and constitutionally protected. If Petitioners had participated, it would avoid any possible error resulting from an inconsistent determination of fault in a separate proceeding.

Finally, regarding the third factor, Arizona had a very serious governmental interest in establishing and fashioning its

own rules of tort law. *See Logan, supra*, 455 U.S. at 433, citing to *Martinez v. California*, 444 U.S. 277, 282 (1980). Arizona's adoption of comparative negligence/several liability was a major change from joint and several liability law which had existed during the entire time that Arizona was a territory or state of the United States. Further, affording equal treatment and protection of the law to all classes of citizens, while not creating special privileged classes, is a constitutionally embedded Arizona state priority. *Ontiveros v. Borak*, 136 Ariz. 500, 512, 667 P.2d 200, 212 (1983). A strong governmental interest therefore exists to ensure that Arizona's new comparative negligence/several liability scheme is equally applied to all citizens and that "special classes of litigants" (*e.g.*, worker's compensation insurance carriers) do not avoid its effect. During the period after Arizona's adoption of A.R.S. § 12-2506, *all* personal injury litigants lived with uncertainty as to the meaning, effect and operation of comparative negligence/several liability law. Worker's compensation carriers cannot be treated as a special class which is privileged or immune from the operation of that new law. Considering all of these factors, therefore, Petitioners' opportunity to participate in the third-party action where the employer's fault was determined was not only an available, sufficient procedure, but was the best, most reasonable procedure under all of the circumstances. Petitioners had full notice and an opportunity to be heard.

B. Petitioners Were Not "Deprived" of "Property" Protected by the Due Process Clause.

Any due process analysis necessarily involves a determination of whether an interest is "property" within the protection of the due process clause. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Due process protects interests that a person has *already acquired* in specific benefits. *Id.* 408 U.S. at 576. A mere "unilateral expectation" is not enough to trigger due

process analysis; rather the person must have a legitimate existing claim of entitlement to property. *Id.* 408 U.S. at 577; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). As applied to statutorily created interests, a "vested interest" in a statutorily created right is protected by the due process clause; but where a statutory change occurs to eliminate or reduce that interest and where a claimant has not obtained a *vested* interest prior to the change, the new law does not deprive the claimant of property without due process. *Sperry and Hutchinson v. Rhodes*, 220 U.S. 502, 505 (1911); *Emblen v. Lincoln Land Company*, 184 U.S. 660, 662-64 (1902).

In the present case, Petitioners were not deprived of "property" protected by the due process clause. Petitioners' interests in the proceeds of the third-party action did not vest until 1990 when Respondent actually recovered monies from the third party. Petitioners' rights were determined under Arizona's comparative negligence/several liability law as it existed in 1990, not as it formerly existed under joint and several liability law before 1988. Petitioners may have had a "subjective expectation" that the former law would apply, but that interest was a mere "unilateral (and erroneous) expectation" not protected by the due process clause.

When Petitioners' interest actually vested in 1990, A.R.S. § 12-2506 had already been enacted. Petitioners' rights therefore cannot be determined (as Petitioners would like) simply based on the pre-1988 manner in which A.R.S. § 23-1023 was construed. Rather, Petitioners' "property" interests must be determined by considering A.R.S. § 23-1023 in light of the more recently enacted A.R.S. § 12-2506. That construction and determination of Petitioners' "property rights" is precisely what the Supreme Court of Arizona decided in *Aitken*: construing A.R.S. § 23-1023 in light of A.R.S. § 12-2506, Petitioners' right of reimbursement arises only when and to the extent Petitioners have paid out more

in worker's compensation benefits than Respondent has lost for her employer's negligence. Petitioners might have recovered more under the former law, but that law had changed before Petitioners' interests vested. Petitioners' expectation that they would recover more under pre-1988 law is not protected by the due process clause.

Petitioners attempt to circumvent this rule by treating the *Aitken* decision in itself as a "change in the law" which occurred in 1995. Petitioners are wrong. *Aitken* merely interpreted how the Arizona Legislature had already altered the law in 1988, before Respondent was even injured. Further, a state court decision relying on state law which involves ownership of property does not "deprive" a person of property simply because it denies that claimant a right to the property. *Tracy v. Ginzberg*, 205 U.S. 170, 177-178 (1907). If Petitioners' position were correct, any state adjudication of property rights would give rise to a due process claim and review by this Court. *Id.* 205 U.S. at 178. The Arizona Legislature's 1988 adoption of comparative negligence/several liability altered a worker's compensation carrier's reimbursement rights. The Supreme Court of Arizona's *Aitken* decision in 1995 merely clarified what the legislature had already done.

Further, Petitioners have not suffered "deprivation" of their property. Even after A.R.S. § 12-2506 and *Aitken*, Petitioners still have their lien and right of reimbursement under A.R.S. § 23-1023. *Aitken* merely clarified when that right arises. *Aitken* held that after the adoption of comparative negligence/several liability, Petitioners' right of reimbursement only arises when Petitioners have paid more in worker's compensation benefits than Respondent's recoverable damages were reduced for her employer's negligence. *Aitken* clarifies *when* Petitioners receive reimbursement. It does not finally "deprive" them of that recoupment.

For these reasons, the *Aitken* decision did not "deprive" Petitioners of "property" protected by the due process clause.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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-and-

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APPENDIX A — PORTIONS OF TRANSCRIPT OF HEARING BEFORE INDUSTRIAL COMMISSION OF ARIZONA ON MAY 18, 1989 (PAGES 1-2, 45-47)

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

ICA Claim No.
374-78-9448

Ins. Carrier No.
A065140

DOI: 5/18/89

FAITH AITKEN,

Applicant;

v.

AMPHITHEATER PUBLIC SCHOOLS,

Defendant Employer;

UNIGARD INSURANCE COMPANY,

Defendant Ins. Carrier.

BEFORE: Jerry C. Schmidt, Administrative Law Judge

2675 East Broadway, Room 102
Tucson, Arizona 85716
May 12, 1989, 9:00 a.m.

Appendix A

APPEARANCES:

For the Applicant:
Arthur V. Gage

For the Defendant Employer:
J. Michael Moeller

For the Defendant Insurance Carrier:
J. Michael Moeller

TRANSCRIPT OF PROCEEDINGS

Reported by: Steven J. Haight

[2] INDEX

WITNESS

FAITH ANGELINE AITKIN

Direct Examination by Mr. Gage 3
Cross-Examination by Mr. Moeller 11
Redirect Examination by Mr. Gage 18

BRUCE D. BINGHAM, M.D.

Direct Examination by Mr. Moeller 19
Cross-Examination by Mr. Gage 27

DR. JENNY FOLEY

Direct Examination by Mr. Gage 31
Cross-Examination by Mr. Moeller 40

Appendix A

* * *

[45] THE COURT: Rephrase your question.

BY MR. MOELLER:

Q. You're saying that she still has actual pain attributed to this accident?

A. Pain is what people perceive. This woman still perceives that she has pain.

Q. I'm asking you physically, do you believe she physically has pain attributed to this accident or is it psychological?

A. See, I'm not an M.D. so I would not be qualified to answer that question.

Q. So let's assume that since you're not an M.D. that the M.D.s all say that the pain that she has cannot be explained as a result of this accident?

A. Okay.

Q. It is not attributable to this accident any more, okay?

A. Okay.

Q. Physically. So the only conclusion has to be — your conclusion has to be she's got some kind of psychological pain, not physical, psychological, attributable to this accident, right? It's not real?

A. That's probably a lay person's way to formulate it, yes.

Q. All right. And you don't see any secondary [46] gain in the fact that you're here in this litigation and she's got another lawsuit against someone else to collect money for this?

MR. GAGE: And has to pay back to the carrier if she recovers anything.

MR. MOELLER: Wait a minute, he is under oath?

I object to that.

THE COURT: What is your objection?

MR. MOELLER: I object to his making comments when there is no question before him as a witness. He is not under oath and it's not an objection.

THE COURT: Can you answer the question, Doctor?

THE WITNESS: I don't know the legal system at all, but I do work with people. Like I say, I have worked with a lot of people through the VA through disability, so I am real familiar with the concept of secondary gain and this is not a woman that I see motivated by secondary gain.

BY MR. MOELLER:

Q. Are you aware that she is involved in a lawsuit?

A. Yes, I am.

[47] Q. And aware that she is involved in this claim?

A. Yes, I was, but just because somebody is involved in a lawsuit doesn't mean that we can conclude that there is secondary gain. There are lots of reasons that people file lawsuits.

BY MR. MOELLER:

Q. Sure. Any others besides getting money?

A. I think lots of times it's a matter of self-esteem, pride, trying to do right by a system.

Q. In her case do you think she's filed this lawsuit to do right by the system?

A. I feel from her perspective she was cutoff by workmans' compensation. She felt very hurt, betrayed by that and I think that's what precipitated the lawsuit.

Q. In your review of the medical records in this case, after October of 1988, have you seen any doctor who has found one singie thing wrong with her that could be treated physically?

A. Well, they're sure trying. I have talked to Fran and I have talked to Doctor McCarthy and they have said that it could be a lumbosacral strain and that's real hard to measure physically. It's a problem with back pain.

APPENDIX B — RESPONDENT FAITH AITKEN'S NOTICE REGARDING THIRD-PARTY ACTION, DATED NOVEMBER 22, 1989, AND FILED IN THE INDUSTRIAL COMMISSION OF ARIZONA NOVEMBER 29, 1989

LAW OFFICES
ROBERT Q. HOYT, P.C.
Please reply to:
3507 NORTH CAMPBELL, SUITE 101
TUCSON, ARIZONA 85719
(602) 327-6801

ROBERT Q. HOYT

CHARLES M. WILMER, JR.

TO WHOM IT MAY CONCERN:

This office represents Faith Aitken in a third-party cause, *Aitken vs. Maya Construction,* Pima County Superior Court Number 254878. I hereby authorize a representative of the firm of Robert Q. Hoyt, P.C., to review all records of the Industrial Commission including transcripts of the hearings involving Faith Aitken's Industrial claim.

s/ Faith A. Aitken
FAITH AITKEN
November 22, 1989

APPENDIX C — RESPONDENT FAITH AITKEN'S OPENING BRIEF IN THE ARIZONA COURT OF APPEALS, DATED DECEMBER 16, 1991, STATEMENT OF ISSUES PRESENTED, PAGE 4

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

NO. 2 CA-IC 91-0042

ICA CLAIM NO. 374-78-9448

CARRIER NO. A065140

FAITH AITKEN,

Petitioner,

v.

INDUSTRIAL COMMISSION OF ARIZONA,

Respondent,

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

Appendix C

PETITIONER'S OPENING BRIEF

GERALD T. BARTON
485 S. Main Avenue
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(602) 798-3313
State Bar No. 005308

ARTHUR V. GAGE
Dee-Dee Samet, P.C.
717 N. 6th Avenue
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State Bar No. 009692

Attorneys for Petitioner

Appendix C

[PAGE 4]

ISSUES PRESENTED

I. WHERE AN INJURED WORKER'S DAMAGES IN A THIRD-PARTY SEVERAL LIABILITY ACTION HAVE BEEN REDUCED DUE TO HER EMPLOYER'S NEGLIGENCE, DOES THE EMPLOYER'S WORKER'S COMPENSATION CARRIER HAVE A RIGHT TO FULL REIMBURSEMENT FOR WORKMEN'S COMPENSATION BENEFITS PAID OR IS THE CARRIER REIMBURSED ONLY TO THE EXTENT THAT BENEFITS PAID EXCEED THE EMPLOYER'S PROPORTIONAL SHARE OF DAMAGES?

   A. IN VIEW OF THE ARIZONA SUPREME COURT'S DECISION IN *DIETZ V. GENERAL ELECTRIC*, AND IN VIEW OF PRINCIPLES OF EQUITY AND PUBLIC POLICY, SHOULD A CARRIER'S RIGHT OF REIMBURSEMENT BE REDUCED BY THE AMOUNT OF THE EMPLOYER'S PROPORTIONAL SHARE OF DAMAGES?

   B. DO THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND COMITY REQUIRE COMMENSURATE REDUCTION OF THE CARRIER'S REIMBURSEMENT?

II. DOES A.R.S. § 23-1023 VIOLATE THE NON-ABROGATION AND NON-LIMITATION CLAUSES OF THE ARIZONA CONSTITUTION IF IT IS CONSTRUED TO PERMIT A WORKMEN'S COMPENSATION CARRIER TO RECOVER FULL REIMBURSEMENT OF

Appendix C

BENEFITS PAID FROM AN INJURED PARTY'S DAMAGES WHICH HAVE BEEN REDUCED BECAUSE OF HER EMPLOYER'S FAULT?

III. IN THE ABSENCE OF A DEPENDENT'S CLAIM FOR DEATH BENEFITS, DOES A WORKMEN'S COMPENSATION CARRIER'S RIGHT OF REIMBURSEMENT EXTEND TO A SPOUSE'S LOSS OF CONSORTIUM DAMAGES RECOVERED IN A SEVERAL LIABILITY ACTION?

APPENDIX D — PETITIONERS AMPHITHEATER AND UNIGARD'S ANSWERING BRIEF IN THE ARIZONA COURT OF APPEALS, DATED MARCH 14, 1992, STATEMENT OF ISSUES PRESENTED FOR REVIEW, PAGE 1

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NO. 2 CA-IC 91-0042

ICA NO. 374-9448

CARRIER NO. A065140

FAITH AITKEN,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ARIZONA,

Respondent,

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

Appendix D

RESPONDENTS' ANSWERING BRIEF

BURY, MOELLER, HUMPHREY & O'MEARA

By s/ J. Michael Moeller
State Bar No. 002432

By s/ Roger W. Frazier
Roger W. Frazier
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(602) 795-8852
State Bar No. 012146
Attorneys for Respondents

Appendix D

[PAGE 1]

ISSUES PRESENTED FOR REVIEW

Respondents acquiesce in the issues chosen by Petitioner for review on appeal.

APPENDIX E — PETITIONERS AMPHITHEATER AND UNIGARD'S RESPONSE TO PETITION FOR REVIEW IN THE SUPREME COURT OF ARIZONA, DATED JULY 15, 1992, STATEMENT OF ISSUES PRESENTED FOR REVIEW, PAGE 2

BURY, MOELLER, HUMPHREY
& O'MEARA
A PROFESSIONAL ASSOCIATION
2606 EAST 10TH STREET
TUCSON, ARIZONA 85716
TELEPHONE: 795-8852

By: J. Michael Moeller, State Bar No. 2432
Roger W. Frazier, State Bar No. 12146
Attorneys for Respondents

IN THE SUPREME COURT
STATE OF ARIZONA

NO. 2 CA-IC 91-0042

ICA NO. 374-9448

CARRIER NO. A065140

FAITH AITKEN,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ARIZONA,

Respondent,

Appendix E

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

RESPONSE TO PETITION FOR REVIEW

* * *

[PAGE 2]

III. ISSUES PRESENTED FOR REVIEW

A. DOES THE FINDING OF A PERCENTAGE OF FAULT AGAINST A NON-PARTY EMPLOYER, PURSUANT TO A.R.S. § 12-2506 IN AN EMPLOYEE'S SUIT AGAINST A THIRD PARTY, IS THE EMPLOYER/CARRIER'S LIEN (AND RIGHT OF REIMBURSEMENT) OF ARS. § 23-1023(C) REDUCED BY THE FINDING OF THE NON-PARTY EMPLOYER'S PERCENTAGE OF FAULT?

B. DOES A.R.S. § 23-1023(C) VIOLATE THE ARIZONA CONSTITUTION DESPITE A FULL REIMBURSEMENT TO THE CARRIER WITH NO REDUCTION BASED ON NON-PARTY EMPLOYER'S FAULT IN THIRD-PARTY LAWSUIT?

Appendix E

C. DOES THE CARRIER'S LIEN EXTEND TO SPOUSES RECOVERY FOR LOSS OF CONSORTIUM IN A SEVERAL LIABILITY CASE?

* * *

APPENDIX F — ORDER OF SUPREME COURT OF ARIZONA GRANTING REVIEW ON ISSUES 1 AND 2 ONLY AND SETTING CASE FOR ORAL ARGUMENT DATED JANUARY 13, 1993

SUPREME COURT

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

January 13, 1993

RE: FAITH AITKEN vs. INDUSTRIAL COMM OF AZ/ AMPHITHEATER PUBLIC SCHOOLS, et al
Supreme Court No. CV-92-0257-PR
Court of Appeals No. 2 CA-IC 91-0042
Industrial Commission No. 374-78-9448/Carrier No. A065140

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 12 1993, in regard to the above-referenced cause:

ORDERED: Petition for review = GRANTED on issues 1 and 2 only.

Appendix F

FURTHER ORDERED: The case shall be set for oral argument.

The Clerk of the Court of Appeals, Division Two, Tucson shall forward the remaining record to the Clerk of the Supreme Court.

NOEL K. DESSAINT, Clerk

TO:

Arthur V. Gage, Esq., Dee-Dee Samet, P.C.
Gerald T. Barton, Esq.
Robert Q. Hoyt, Esq., Law Offices of Robert Q. Hoyt
Anita R. Valainis, Esq., Chief Counsel, Industrial Commission of Arizona
J. Michael Moeller, Esq. and Roger W. Frazier, Esq., Bury, Moeller, Humphrey & O'Meara
Hon. Jerry C Schmidt, Administrative Law Judge
Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two
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Supreme Court, U.S.
FILED
APR 30 1996
CLERK

(3)

No. 95-1484

In The

Supreme Court of the United States

October Term, 1995

AMPHITHEATER PUBLIC SCHOOLS, et al.,

Petitioners,

v.

FAITH AITKEN,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Arizona

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

J. MICHAEL MOELLER
Counsel of Record for Petitioners

and

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15pp

LIST OF PARTIES

The parties to the proceedings below were Faith Aitken, the Industrial Commission of Arizona, Amphitheater Public Schools, and Unigard Insurance Company. There are no parents or subsidiaries.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

TABLE OF AUTHORITIES iii

I. THE FEDERAL ISSUE OF A TAKING WITHOUT DUE PROCESS WAS SUFFICIENTLY PRESERVED FOR THIS COURT'S JURISDICTION AND CERTIORARI REVIEW 1

II. THE ARIZONA SUPREME COURT'S OPINION IS A TAKING WITHOUT DUE PROCESS BECAUSE THERE WAS NO REALISTIC OPPORTUNITY TO HAVE NOTICE OR DEFEND AGAINST A CHARGE OF "NON-PARTY" FAULT IN THE THIRD PARTY SUIT, NOR IS THERE A REALISTIC OPPORTUNITY FOR NOTICE AND A HEARING IN FUTURE CASES 4

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Aitken v. Industrial Commission, 183 Ariz. 387, 904 P.2d 456 (Ariz. 1995) 5, 6, 7, 8

Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988).....1, 3

Boy v. Fremont Indemnity Co., 154 Ariz. 334, 742 P.2d 835 (Ariz.App. 1987)..... 6

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) 6, 8, 9

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)..... 2

Dietz v. General Electric Co., 169 Ariz. 505, 821 P.2d 166 (Ariz. 1991) 7

Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).....2, 3

Hathorn v. Lovorn, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982)..... 1

In re Dos Cabezas Power Dist., 17 Ariz.App. 414, 498 P.2d 488 (Ariz.App. 1972)..... 8

Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)..... 1

Law v. Superior Court of the State of Arizona, Supplemental Opinion, 157 Ariz. 147, 755 P.2d 1135 (Ariz. 1988) 8

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)..... 2

State ex rel. Industrial Commission v. Pressley, 74 Ariz. 412, 250 P.2d 992 (Ariz. 1952)..... 5

TABLE OF AUTHORITIES – Continued

Page

State ex rel. Industrial Commission v. Reese, 74 Ariz. 425, 250 P.2d 1000 (Ariz. 1952) 5

Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 542 P.2d 1102 (Ariz. 1975) 5

Tracy v. Ginzberg, 205 U.S. 170, 27 S.Ct. 461, 51 L.Ed. 755 (1907) 9

Weinco, Inc. v. Katahn Associates, Inc., 965 F.2d 565 (7th Cir. 1992) 7

Yee v. Escondido, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) 3

Young v. Industrial Commission, 146 Ariz. 582, 707 P.2d 986 (Ariz.App. 1985) 6

UNITED STATES CONSTITUTION

Fifth Amendment 4, 10

Fourteenth Amendment 4, 10

ARIZONA REVISED STATUTES (A.R.S.)

A.R.S. § 12-2506 7

A.R.S. § 23-1023(C) 5, 7

Rule 22, Arizona Rules of Civil Appellate Procedure 1

I. THE FEDERAL ISSUE OF A TAKING WITHOUT DUE PROCESS WAS SUFFICIENTLY PRESERVED FOR THIS COURT'S JURISDICTION AND CERTIORARI REVIEW

Claims adequately raised on a petition for rehearing, but denied without opinion, may be accepted for certiorari jurisdiction if the state court does not strictly or regularly follow such a procedural rule precluding issues raised for the first time in a petition for rehearing. *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262-65, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). A procedural rule which is subject to discretion is not applied regularly. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988).

The Arizona Supreme Court has the discretion to hear constitutional issues at any time during an appeal. Rule 22 of the Arizona Rules of Civil Appellate Procedure allows a motion for reconsideration to discuss matters in which it is claimed the court erred in determination of facts and law. In this case, the Supreme Court of Arizona erred in its determination of law in that it created the due process problem. The court has never stated that it could not hear a new constitutional issue on a motion for reconsideration. Therefore, the matter was discretionary with the state court.

The Arizona Supreme Court's denial of the motion for reconsideration without opinion does not create a presumption of a procedural bar to the presentation of

the constitutional issues to the Arizona court. Specifically, this Court has stated:

> "Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar."

Harris v. Reed, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989), citing *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985), and *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). None of the cases relied on by Respondent are distinguishable from the instant situation based on whether there were other federal claims also involved. The point here is that the federal claim made on the motion for reconsideration was thus inserted into the case due to the absence of any express statement by the court that it would not consider the matter due to some procedural bar. Here, because there was no such express statement of an independent state procedural bar, and the constitutional claim could otherwise have been brought on the motion for reconsideration, the claim is preserved.

Although the Arizona Supreme Court's original opinion was based entirely on state law, the federal constitutional claims became part of the case when they were raised in the motion for reconsideration. They were properly before the state court. The court's denial of the motion for reconsideration without opinion failed to contain the plain statement that is necessary when a ruling

could have been based on either federal or state law. *See Harris, supra,* 489 U.S. at 261-66, 109 S.Ct. at 1042-45.

Respondent misplaces her reliance on cases which preceded *Banker's Life* and *Harris* to argue that this court cannot hear any new federal issues raised in a petition for review that is denied without opinion. Cases such as *Banker's Life* and *Harris* provide some of the basic rules on which Petitioners rely in their Petition and herein. And Respondent's reliance on *Yee v. Escondido,* 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992) is misplaced because the instant case is distinguishable from *Yee* in a very important way. In *Yee,* this Court would not review a federal claim that was first raised in a petition for review to the California Supreme Court on a decision of the California Court of Appeal, where the California Supreme Court denied discretionary review. This Court held that such a denial of discretionary review expresses no view as to the merits. *Id.* The instant case did not involve whether to accept discretionary review, but whether to grant a motion for reconsideration in a case that was already before the court on review. The "discretion" in this case wasn't whether to take review, but that the court had the discretion to take constitutional issues at any time, and therefore that there was no procedural bar. Thus, the *Yee* case sheds no light on what should be done in the instant matter, and this Court should not assume that the denial of the motion for reconsideration was due to a want of proper presentation in the state court.

Respondent's argument that the issues were not identified properly according to the requirement discussed in *Banker's Life* is without merit. The Petitioners expressly asserted the violations of takings and due process clauses

of the Fifth and Fourteenth Amendments because they were not given fair notice and a hearing to determine their "non-party" fault in the third-party action.

Because the court had the discretion to entertain the newly raised constitutional issues, the denial of the motion for reconsideration is not deemed to be a procedural bar. Further, because the federal issues were squarely before the court within a timely procedure for bringing those issues, the court's denial should have contained a "plain statement" that its decision was adequately based on state law and therefore would not consider the federal issues, but it did not. Therefore, the constitutional issues were preserved for review by this court.

II. THE ARIZONA SUPREME COURT'S OPINION IS A TAKING WITHOUT DUE PROCESS BECAUSE THERE WAS NO REALISTIC OPPORTUNITY TO HAVE NOTICE OR DEFEND AGAINST A CHARGE OF "NON-PARTY" FAULT IN THE THIRD PARTY SUIT, NOR IS THERE A REALISTIC OPPORTUNITY FOR NOTICE AND A HEARING IN FUTURE CASES.

The due process issue here is a procedural one that prevented the Petitioners from defending the employer's non-party fault in the third-party case before that finding of non-party of fault was applied to reduce Petitioners' lien. Respondent suggests that Petitioners had an opportunity to intervene in the third-party action, and failed to do so. For this proposition, Respondent relies on cases that preceded the lien statute by a dozen years, and which applied instead to different situations.

In *State ex rel. Industrial Commission v. Reese*, 74 Ariz. 425, 250 P.2d 1000 (Ariz. 1952) and *State ex rel. Industrial Commission v. Pressley*, 74 Ariz. 412, 250 P.2d 992 (1952), the Arizona Industrial Commission was entitled to intervene in civil law suits to recover benefits paid to workers who could only sue a third party if they made an election not to receive benefits from the commission. But these cases were not about an employer or its insurance carrier intervening in a third-party suit to protect its lien under A.R.S. § 23-1023(C). The lien statute here was created in 1965, and there is no evidence of any intervention of any worker's compensation carrier in a third-party suit since the enactment of the lien statute in 1965. There has been no need to do so because the law applied in every Arizona case until the time of the *Aitken* decision consistently refused to reduce carrier's lien even where an employer was contributorily negligent:

> "There is no provision in A.R.S. § 23-1023(C) to deny an employer a lien even if the employer was contributorily negligent. The right of an employer, or its workmen's compensation carrier, to enforce its lien under A.R.S. § 23-1023(C) against any judgment recovered by an employee on a third party action is not dependent on the employer's freedom from concurrent negligence contributing to the injury and a third party cannot assert such negligence as a defense or ask for indemnification from said employer or his carrier."

Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 409, 542 P.2d 1102, 1108 (Ariz. 1975). Shortly before the *Aitken* case arose, the Court of Appeals of Arizona also noted that

Arizona courts had consistently resisted efforts to limiting the compensation insurer's liens, stating that the carrier must be reimbursed according to the terms of the statute and that those terms cannot be modified by the courts. *Young v. Industrial Commission*, 146 Ariz. 582, 584-85, 707 P.2d 986, 988-89 (Ariz.App. 1985); *Boy v. Fremont Indemnity Co.*, 154 Ariz. 334, 336, 742 P.2d 835, 837 (Ariz.App. 1987). Therefore, at the time that Respondent brought her third party suit against Maya Construction in 1988 (or when the case went to trial in 1990), Petitioners would have had no need to seek to intervene in the third-party action, because of this consistent application of the of the law by the Arizona courts. Respondent points to what she believes to be constructive notice of the particular third-party law suit in this case, but under the consistent application of Arizona law, there would have been absolutely no reason for the carrier to intervene in the third party action to litigate the portion of its non-party fault in that action. Such a need never arose until the Arizona Supreme Court's decision in *Aitken*.

This Court has held that where repeated constructions of laws of a state have been consistently acted upon in practice, then a change in the decisional law that would have required a party to seek a remedy in a manner that is now unavailable and that previously was never opened to him, violates due process of law in its primary sense of an opportunity to be heard and defend substantive rights. *Brinkerhoff-Faris Co., v. Hill*, 281 U.S. 673, 680-81, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

When a party ***wilfully*** fails to avails itself of its opportunity to be heard, that does not constitute a violation of due process. *Weinco, Inc. v. Katahan Associates, Inc.* 965 F.2d 565, 568 (7th Cir. 1992.) At page 18 of the Respondent's Brief in Opposition, Respondent misquoted *Weinco* by leaving out the word "wilful," the most critical word of the sentence. There is no evidence of a "wilful" failure of the Petitioners to avail themselves of an opportunity to be heard regarding the assessment of non-party fault against them which was later used to reduce their lien. Failure to seek to intervene prior to the Arizona Supreme Court's even suggesting the issue in its 1991 case of *Dietz v. General Electric Co.*, 169 Ariz. 505, 821 P.2d 166 (Ariz. 1991), and therefore before a need even arose, cannot be deemed to be a wilful failure to avail oneself of an opportunity to be heard.

Respondent argues that the property rights that vested in the lien in 1990 are rights that are limited according to Arizona Supreme Court's 1995 Decision in *Aitken*, which, according to the Respondent, is retroactive to 1988, when A.R.S. § 12-2506 abolished joint and several liability. But the Arizona Supreme Court created *new* law out of two statutes:

> "We agree with the court of appeals that when the Arizona legislature passed [A.R.S. § 23-1023(C)], it did not anticipate the manner in which compensation liens would operate outside the universe of joint and several liability, which continued to exist as the law of this state for another twenty-two years. Nor is there evidence that the legislature considered this question in 1987 when A.R.S. § 12-2506 was adopted. In fact, some might argue that we created the

> 'problem' by our 1991 decision in *Dietz* and, therfore, that it should be amendable to a judicial solution."

Aitken v. Industrial Commission, 183 Ariz. 387, 391, 904 P.2d 456, 460 (Ariz. 1995); also at Petitioners' Appendix, pp. A-10 – A-11. Continuing, the court stated:

> "We now hold that a carrier may assert a lien on a third party recovery only to the extent that the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by the verdict in the action."

Id., 183 Ariz. at 392, 904 P.2d at 461; also at Petitioners' Appendix, p. A-12. As noted in *Brinkerhoff-Faris, supra*, due process rights can be violated when the judiciary construes otherwise valid statutes. 281 U.S. at 679-680. Here, the court took two statutes, each valid on their own, and construed them in a way so as to deprive the Petitioners of their due process to be heard.

A statutory amendment cannot be retroactively applied to defeat a vested right. *In re Dos Cabezas Power Dist.*, 17 Ariz.App. 414, 498 P.2d 488 (Ariz.App. 1972). The Arizona Supreme Court holds that its opinions are retroactive unless otherwise stated, and that basically it is a policy issue for the court to decide whether or not to make a case retroactive. *See, Law v. Superior Court of the State of Arizona, Supplemental Opinion*, 157 Ariz. 147, 1160-1162, 755 P.2d 1135, 1148-1150 (Ariz. 1988). However, when the court itself makes new law that was not foreseen, or even interprets a statute in a way that was not foreseen (in 1988-1990), its opinion should not be permitted to retroactively take away rights that otherwise have vested. To do so is to allow the court exercise a

limitation on rights before the Petitioners had any reasonable need or reason to intervene in the third party suit. Due process is denied to Petitioners because by the time any change in the law was foreseen or could have been anticipated, the time to intervene in a third-party suit had already passed. *Brinkerhoff-Faris, supra.*

Tracy v. Ginzberg 205 U.S. 170, 27 S.Ct. 461, 51 L.Ed. 755 (1907), does not apply here because the Petitioners were not a party to the third-party law suit in which its non-party fault was determined that was used to reduce its lien rights. This reason also further distinguishes this case from those cited by Respondent that a party is not denied due process when it litigates its own right to a particular item of property. And while Petitioners had a right in this action before the Arizona courts to argue the meaning of the lien statutes or how they are to be construed, there can be no denying that prior to the *Diez* case in 1991, the Petitioners had no basis or reason to seek to intervene and litigate their non-party fault in the third-party action which was over with by the time the *Dietz* opinion was handed down, and therefore, they had no meaningful opportunity to be heard.

Finally, despite the constructive notice that Respondent alleges the Petitioners had in this case, there simply is no notice requirement under the worker's compensation law that a worker would have to notify an employer or carrier of a third party law suit. And even if intervention in the third-party law suit is a way to protect the assignment of non-party fault against the employer, this still requires a notice provision, and the Respondents have pointed to none.

CONCLUSION

Jurisdiction of this matter is appropriate, and this Court should grant the Petition to correct the unjust taking without due process that occurred in this case in violation of the Fifth and Fourteenth Amendments.

April 29, 1996

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